92-688

Supreme Court, U.S.
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No. ____

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1992

LOCAL 776, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
*Petitioner,*

*v.*

STROEHMANN BAKERIES INC.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the court usurp the parties' collectively bargained-for right to have its disputes over interpretation or application of the collective bargaining agreement decided by the arbitrator?

2. Did the court abuse its authority by substituting its judgment for that of the labor arbitrator who decided the underlying dispute?

3. Does the court's ability to overturn arbitration awards on public policy grounds permit overturning an award when the award itself does not violate public policy?

4. Does the public policy exception to the usual deference given to arbitration awards mandate that the arbitrator decide the underlying charge when there are independent grounds for his or her decision?

5. Is remand to a different arbitrator a proper remedy when arbitrator bias was not raised during the arbitration and when the arbitrator's decision, viewed as a whole, does not demonstrate bias?

## PARTIES

The parties to the proceeding in the Court below were Teamsters Local Union No. 776 (Union), the Petitioner here, and Stroehmann Bakeries, Inc. (Employer), the Respondent here. The Equal Employment Advisory Council submitted an Amicus Curiae Brief to the Court below.

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LOCAL 776, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
*Petitioner,*

*v.*

STROEHMANN BAKERIES, INC.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Teamsters Local Union No. 776, respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on June 29, 1992.

### OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at *Stroehmann Bakeries, Inc. v. Local 776 Int'l Brotherhood of Teamsters*, _____ F.2d _____ and at 140 LRRM 2625, and is reproduced in the Appendix at A-1 to A-32. The decision of the United States District Court for the Middle District of Pennsylvania is reported at *Stroehmann Bakeries, Inc. v. Local 776 Int'l Brotherhood of Teamsters*, 762 F.Supp. 1187 (M.D. Pa. 1991), and

at 136 LRRM 2874, and is reproduced in the Appendix at A-33 to A-38. Arbitrator Sands' decision is reported as *In re Stroehmann Bakeries, Inc. and International Brotherhood of Teamsters Local 776* in 98 LA 873 (1990), and is reported in the Appendix at A-39 to A-48.

## STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was filed on June 29, 1992. On July 24, 1992 the United States Court of Appeals for the Third Circuit denied the Union's Petition for Rehearing *In Banc*. Jurisdiction of this Court is proper under 28 U.S.C.A. §1254(1).

## STATUTES INVOLVED

Section 203(d) of the Labor-Management Relations Act of 1947:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases. 29 U.S.C.A. §173(d).

## STATEMENT OF THE CASE

The Union and the Employer are parties to a collective bargaining agreement that regulates the terms and conditions of employment for Stroehmann's employees who are members of the collective bargaining unit. The collective bargaining agreement provides for arbitration of disputes. App. at A-53.[1] The Agreement requires the Employer to exercise its power of discipline and discharge fairly, and with regard for the reasonable rights of employees. App. at A-52. It also requires management to investigate and collect

1. The abbreviation "App." will be used to refer to the Appendix that accompanies this Petition for a Writ of Certiorari.

the facts before making the final decision to terminate an employee. App. at A-57.

The Union and the Employer voluntarily submitted a grievance, filed by Samuel Leonard, to arbitration. The grievance arose when the Employer terminated Mr. Leonard's employment. The series of events which led to Mr. Leonard's termination began on November 14, 1989 when the Employer received a telephone call from the manager of Stauffer's market, one of the Employer's customers. Kimberly Wiegand was a Stauffer's employee. Stauffer's manager told the Employer that Kimberly Weigand's mother had phoned him and had told him that Mr. Leonard had sexually harassed Ms. Wiegand on November 12, 1989, while Leonard was making a delivery to Stauffer's market. App. at A-4.

Mr. Garrett and Mr. Jacobs, two of the Employer's management officials, telephoned Kimberly Wiegand and discussed the incident with her over a speaker phone. The conversation lasted for about twenty minutes. App. at A-41. Jacobs did not participate in the entire conversation. App. at A-42. Garrett and Jacobs did not meet with Ms. Wiegand, nor did they have any additional telephone conversations with her. App. at A-43. During the one conversation that they did have with Ms. Wiegand, they "went easy" on her and did not question any of the inconsistencies in the story that she told them, nor did they question any inconsistencies between the story she told them and the report she had given her mother. App. at A-22, n.3, A-42.

On November 15, 1989, Jacobs phoned Mr. Leonard and asked him to come in to discuss a problem. Jacobs did not tell Mr. Leonard that the meeting would or could involve any disciplinary action. Mr. Leonard asked if he should bring a union representative to the meeting; Jacobs said that was up to Mr. Leonard. App. at A-42. At the time he called Mr. Leonard, Jacobs had already decided to suspend him pending dismissal. App. at A-46. On November 20, 1989, without any further investigation, Jacobs telephoned Mr. Leonard and fired him. App. at A-44.

Mr. Leonard filed a grievance over his termination and the matter was taken to arbitration. Arbitrator Sands found that, under the

terms of the collective bargaining agreement, Stroehmann's investigation was insufficient, and that the Company had failed to demonstrate that it had just cause to fire Mr. Leonard. App. at A-46-47. Because he found that the Company did not have just cause to fire Mr. Leonard, Arbitrator Sands ordered the Company to reinstate him with full back-pay and benefits, minus interim earnings. App. at A-47.

The Company sought judicial review of Arbitrator Sands' award. The United States District Court for the Middle District of Pennsylvania granted the Company's Motion for Summary Judgment, concluded that the arbitrator's award violated public policy, vacated the award, and remanded the matter to a different arbitrator. App. at A-38. The Union appealed that decision to the United States Court of Appeals for the Third Circuit, and in an opinion issued on June 29, 1992, two of the judges on the three-judge panel affirmed the District Court's decision. App. at A-19. The Court of Appeals held that the arbitrator's award reinstating an employee *accused* of sexual harassment without a determination regarding the merits of the allegation violates well-established and dominant public policies concerning sexual harassment in the workplace. The Court also held that Arbitrator Sands demonstrated an unacceptable predisposition towards Leonard and against the Company, and that the District Court did not, therefore, abuse its discretion in ordering that another arbitrator be appointed to conduct a *de novo* hearing on the merits of the allegations against Leonard. The Union filed a timely petition for a rehearing *in banc* and on July 24, 1992 the Union's petition for a rehearing *in banc* was denied. App. at A-49.

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Middle District of Pennsylvania, was grounded in §301(a) of the Labor-Management Relations Act of 1947. 29 U.S.C.A. §185(a).

## ARGUMENT

### I. THE DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CONFLICTS WITH THIS COURT'S PRIOR DECISIONS.

### A. THE COURT USURPED THE PARTIES' RIGHT TO HAVE ITS DISPUTES RESOLVED BY AN ARBITRATOR OF THEIR CHOICE.

This Honorable Court has long recognized that arbitrators play a unique role in labor-management relations.

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 564, 46 LRRM 2416, 2419 (1960). When the parties have bargained for an arbitrator's interpretation of the contract, an arbitrator's opinion, not the court's opinion, is what they get. *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 46 LRRM 2414 (1960), *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

In the Labor-Management Relations Act, Congress said that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . ." 29 U.S.C.A. §173(d). For over thirty years this Honorable Court has, therefore, given extreme deference to arbitration awards. *Enterprise Wheel*, 363 U.S. 593. This Court has recognized that the parties bargained for an arbitrator to settle their disputes and are free to bargain over the power that they give to that arbitrator. *Warrior & Gulf Navigation*, 363 U.S. 574. "Because the parties have contracted to have disputes settled by an arbitrator chosen by them, rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

## B. THE COURT ABUSED ITS AUTHORITY BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE ARBITRATOR.

This Honorable Court has, for the past thirty years, held that "courts play only a limited role when asked to review the decision of an arbitrator." *Misco*, 484 U.S. at 36. The court may not reconsider the merits of an arbitration award.

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if the courts had the final say on the merits of the awards . . . As long as the arbitrator's award 'draws its essence from the collective bargaining agreement' and is not merely 'his

own brand of industrial justice,' the award is legitimate.

*Id.* (Quoting *Enterprise Wheel*, 363 U.S. at 596-97) (Citations omitted).

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> The courts therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.

*American Manufacturing*, 363 U.S. at 567-68. The only question that should have been asked in this case was whether Arbitrator Sands' decision, that Stroehmann must conduct more than a cursory investigation and must have just cause to terminate an employee, draws its essence from the collective bargaining agreement.

There can be no doubt that the United States Court of Appeals for the Third Circuit reconsidered the merits of the arbitrator's award. The Court of Appeals specifically found that Stroehmann had provided Mr. Leonard with adequate industrial due process. App. at A-15, 17. That consideration of the merits was impermissible. The federal policy of settling labor disputes by arbitration would be undermined if the courts had the final say on the merits of the awards. *Misco*, 484 U.S. at 36 (quoting *Enterprise Wheel*, 363 U.S. at 596).

Nor may the court reject an award where it disagrees with the arbitrator's remedy.

> [W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have

> no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined.

484 U.S. at 38. Arbitrator Sands found that the collective bargaining agreement required Stroehmann's higher management to conduct an investigation and to collect facts before reaching a final decision, that the cursory investigation conducted by the Company was inadequate to support its decision to terminate, and that by the time anyone heard Mr. Leonard's account of the incident, the decision to terminate him had already been made. App. at A-43, 46, 47. Arbitrator Sands then found that because the Company had not done the type of investigation mandated by the collective bargaining agreement, Mr. Leonard was entitled to reinstatement. Even if the arbitrator had found that Mr. Leonard did, in fact, sexually harass Ms. Wiegand, the court would be powerless to overturn the discipline imposed by the arbitrator simply because the court felt that discharge was a more appropriate remedy. *See* 484 U.S. at 41.

The courts may not reject an arbitrator's findings or interpretation of the collective bargaining agreement merely because it disagrees with them. 484 U.S. at 38. The Court of Appeals obviously disagreed both with the arbitrator's findings and with his interpretation of the collective bargaining agreement. The arbitrator found that Mr. Leonard had not been afforded industrial due process, while the majority of the Court of Appeals found that the Company had afforded industrial due process. App. at A-15, 17. It matters not whether the arbitrator's decision was, in the court's view, wrong, erroneous, misguided, or downright silly, so long as it drew its essence from the collective bargaining agreement. *Misco*, 484 U.S. at 39. "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.*

This Honorable Court has also said that when the subject of a dispute is arbitrable, any procedural questions that grow out of the dispute and that bear on its final disposition are left to the arbitrator.

*Misco*, 484 U.S. at 40. Arbitrator Sands found that the Company had not met its burden of showing that Mr. Leonard's termination had been for just cause. That is a decision which belongs to the arbitrator. Yet, the Court of Appeals vacated the arbitrator's decision.

Arbitrator Sands properly placed the burden of proof on the employer, here, to justify the termination. The Court of Appeals would alter that and require termination of an individual who has merely been accused of sexual harassment. App. at A-27. The Court of Appeals would place the burden of proof upon the employee and require him to show that he was innocent and was therefore entitled to reinstatement. The Court's shifting of this burden of proof usurps the arbitrator's function, cavalierly tosses aside years of precedent and American jurisprudence, and attempts to inject the Napoleonic Code into the collective bargaining process. In doing so, the court has set a dangerous precedent.

## C. UNDER THE PUBLIC POLICY EXCEPTION COURTS DO NOT HAVE THE AUTHORITY TO OVERTURN AN ARBITRATION AWARD UNLESS THE AWARD ITSELF VIOLATES PUBLIC POLICY.

This Honorable Court has said that "[a] court may refuse to enforce a collective bargaining agreement when the *specific terms* contained in that agreement violate public policy." 484 U.S. at 43 (Emphasis added); *see also W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 113 LRRM 2641 (1983). This Court has also said that a court may refuse to enforce an arbitrator's interpretation of the collective bargaining agreement if the contract, *as interpreted* by the arbitrator, violates some explicity public policy. *Misco*, 484 U.S. at 43. (Emphasis added). Here, the Court of Appeals does not cite any specific terms of the contract which violate public policy. Arbitrator Sands' interpretation of the contract requires the employer to conduct more than just a cursory investigation of the charges against an employee, and requires the employer to have just cause to fire an employee. The Court of Appeals does not cite any public policy against requiring industrial due process, or against requiring just cause to fire an employee. In fact, there is a strong public policy in favor of those very things.

This Honorable Court has said that its decision in *Misco* does not sanction any broad judicial power to set aside arbitration awards on public policy grounds. The question is whether the *award* itself "creates any explicit conflict with other laws and legal precedents . . . ." 484 U.S. at 43. The award here merely requires the Company to reinstate an employee whom it had terminated without just cause.

What must be remembered here is that the arbitrator did not find that Mr. Leonard had sexually harassed anyone. Leonard was merely accused of harassment. The Court of Appeals did not cite any strong public policy requiring termination of individuals merely accused of sexual harassment. This case mandates, at least in the Third Circuit, that those accused of sexual harassment be terminated immediately, whether or not the accused actually engaged in the conduct alleged, for employers will fear that failure to do so will expose them to liability if they keep a possible harasser in the workplace.

The District Court and Court of Appeals cited Title VII as the source of the strong public policy against sexual harassment in the workplace. What these courts have overlooked is that there is no Title VII case here. Title VII prohibits an employer from discriminating against an individual on the basis of gender, or from engaging in sexual harassment of its employees. Title VII also makes the employer liable if his employees engage in sexual discrimination against, or sexual harassment directed at, their fellow employees. Kimberly Wiegand and Samuel Leonard did not work for the same employer. Samuel Leonard was not accused of sexually harassing a Stroehmann's employee.

## D. THE COURT OF APPEALS DID NOT HAVE AUTHORITY TO DECIDE THE ISSUE OF ARBITRATOR BIAS WHEN THAT ISSUE WAS NOT RAISED IN THE ARBITRATION PROCEEDINGS.

What is not apparent from the Third Circuit's decision in this case is that the issue of arbitrator bias was not raised during the arbitration. The Company did not question the arbitrator's impartiality until the arbitrator ruled against it. The Company then screamed bias and concluded that since the arbitrator ruled against it he must have been

biased. This Court has made it clear that procedural issues are left to the arbitrator. *Misco*, 484 U.S. 29. Procedural issues include evidentiary questions. The Third Circuit dissected the arbitrator's decision and culled various isolated items to demonstrate that the arbitrator was biased. When read as a whole, the arbitrator's decision demonstrates otherwise. Sexual harassment was clearly abhorrent to him.

The Third Circuit, in an effort to overturn a decision it disliked, decided the bias question when it had never been raised in the arbitration. The Company, however, clearly waived the right to raise that issue by failing to raise it during the arbitration proceeding. The Third Circuit's unprecedented action conflicts with other courts which have held that if an issue of bias is not raised in the arbitration it is waived. *Cook Industries, Inc. v. C. Itoh & Co.*, 449 F.2d 106 (2nd Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

## II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

### A. THERE IS A SPLIT IN THE CIRCUITS OVER WHETHER A COURT'S REVIEW IS LIMITED TO WHETHER THE AWARD ITSELF VIOLATES PUBLIC POLICY.

Although the language of *Misco* is clear, and states that the award must violate public policy, the United States Court of Appeals for the Third Circuit has, in this case, held differently. Other Courts of Appeal have, however, followed the language of *Misco*. 484 U.S. at 43. The United States Court of Appeals for the Sixth Circuit has held that it is the award, itself, which must create an explicit conflict with other laws and precedents. *Interstate Brands Corp. v. Teamsters Local No. 135*, 909 F.2d 885, 893 (6th Cir. 1990), *cert. denied*, _____ U.S. _____, 111 S.Ct. 1104 (1991), *Shelby County Health Care Corp. v. AFSCME Local 1733*, _____ F.2d _____, 1992 WL 139314 (6th Cir. 1992), *In re Pan American Corp. v. Air Line Pilots Ass'n*, _____ B.R. _____, 1992 WL 96700 (S.D.N.Y.

1992). The Seventh Circuit also considered whether the arbitrator's award, itself, the reinstatement of an employee who sexually harassed a co-worker, violated public policy; and concluded that it did not. *Chrysler Motors v. Int'l Union, Allied Industrial Workers of America*, 959 F.2d 685, 139 LRRM 2865 (7th Cir. 1992), *cert. denied*, _____ U.S. _____ (1992). The Ninth Circuit too, considered whether the award, there reinstatement, violated public policy, rather than whether the employee's conduct violated public policy. *Stead Motors v. Machinists Lodge 1173*, 886 F.2d 1200, 132 LRRM 2689 (9th Cir. 1989).

The Third Circuit's decision in this case, however, looked to whether the employee's conduct violated public policy. The Eleventh Circuit has, likewise, looked to whether the employee's conduct, rather than the arbitration award, violated public policy. *Delta Air Lines v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665, 130 LRRM 2014 (11th Cir. 1988). Both the Third Circuit and the Eleventh Circuit have used the narrow review of arbitration awards under the public policy exception to rewrite arbitration awards with which they disagreed. That, this Honorable Court has said, they may not do.

## B. THERE IS A SPLIT IN THE CIRCUITS OVER WHETHER THE PUBLIC POLICY AGAINST SEXUAL HARASSMENT PROHIBITS RETURNING AN INDIVIDUAL ACCUSED OF SEXUAL HARASSMENT TO THE WORKPLACE.

The United States Court of Appeals for the Tenth Circuit did not find any public policy against returning a known sexual harasser to the workplace and refused to disturb an arbitration award returning the harasser to the workplace despite the public policy implications. The case involved a single episode of sexual harassment. *Communications Workers of America v. Southeastern Electric Cooperative*, 882 F.2d 467, 132 LRRM 2381 (10th Cir. 1989). The United States Court of Appeals for the Seventh Circuit did not find a public policy against returning a known sexual harasser to the workplace and refused to disturb an arbitration award returning a known harasser to the workplace despite the public policy implications. The worker in question was a 'repeat offender' who had engaged in at least four other instances of sexual harassment. *Chrysler*

*Motors*, 959 F.2d 685. In *Chrysler Motors*, the employee had four prior incidents of sexual harassment and was terminated for the fifth incident. The arbitrator there found that Chrysler did not acquire that information until after the discharge, and that the evidence on which the discharge was based did not indicate that the employee could not be rehabilitated. The arbitrator concluded that the employee was not discharged for good cause, and reduced the penalty from termination to a thirty-day suspension. The Court concluded that the award of reinstatement did not violate public policy. *Id.*

## III. IN DECIDING THAT THE UNDERLYING HARASSMENT CHARGE MUST BE DECIDED, BECAUSE OF THE PUBLIC POLICY IMPLICATIONS, WHEN THE ARBITRATOR STATES ALTERNATIVE, VALID GROUNDS FOR HIS DECISION, THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE UNITED STATES SUPREME COURT.

Although this Honorable Court, in *Misco*, did not require that the arbitrator reach the underlying question of whether or not the employee had or had not used marijuana in the employer's parking lot, the Third Circuit Court of Appeals is treating the public policy against sexual harassment differently than the public policy against drug use. The Third Circuit is requiring that the arbitrator determine whether or not the harassment actually occurred, despite the fact that the arbitrator decided the case on a just cause issue. This Court has not decided whether the public policy against sexual harassment requires a decision on the underlying charge when there are other valid grounds for an arbitrator's decision.

Other courts have held that a determination of the underlying charge is not necessary where the public policy was air line safety and where there was an independent, due process basis for the arbitrator's decision. *Pan American Corp.*, 1992 WL 96700. Nor was it necessary to decide the underlying charge when the issue was

employee aggression. *Perma-Line Corp. v. Sign Pictorial and Display Union, Local 230,* 639 F.2d 890 (2nd Cir. 1981).

If the public policy against sexual harassment is to be treated differently than the public policies related to air line safety, workplace safety, and drug use, that statement should come from this court. If the Court fails to do so, it will be inundated with cases attempting to rank the various public policy issues and define the parameters of arbitration which must accompany each public policy issue.

## CONCLUSION

For these reasons, the Union respectfully requests that this Honorable Court grant its Petition for a Writ of Certiorari.

Respectfully Submitted,

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Dated: 10/14/92

# APPENDIX

Filed June 29, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 91-5261

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STROEHMANN BAKERIES, INC.,
Appellee

v.

LOCAL 776, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Appellant

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Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 90-01359)

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Argued: September 20, 1991

PRESENT: BECKER, HUTCHINSON and SCIRICA, *Circuit Judges*

(Opinion Filed June 29, 1991 (sic))

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Employment Advisory Council

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OPINION OF THE COURT

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HUTCHINSON, *Circuit Judge*.

Local 776 International Brotherhood of Teamsters (the Union), appeals an order of the United States District Court for the Middle District of Pennsylvania granting Stroehmann Bakeries, Incorporated (Stroehmann's) motion for summary judgment, denying the Union's cross-motion for summary judgment, vacating labor arbitrator John Sands' (Arbitrator Sands) award reinstating Samuel Leonard (Leonard), a former Stroehmann employee, with full back pay, and remanding the matter for a *de novo* hearing before a different arbitrator. *See Stroehmann Bakeries, Inc. v. Local 777 Int'l Brotherhood of Teamsters*, 762 F. Supp. 1187, 1190 (M.D. Pa. 1991). Pursuant to a work rule, Stroehmann discharged Leonard for "immoral conduct" after a customer reported him for sexual harassment. Arbitrator Sands concluded Stroehmann had not given Leonard a full opportunity to refute the charge or explain his conduct and so reinstated him without deciding whether the charge of sexual harassment was true. *See id.* at 1188-90. The issues on ap-

peal are whether the district court properly concluded that the arbitrator's award violated public policy and, if so, whether it properly vacated the award and remanded the matter to a different arbitrator.

We will affirm. Under the circumstances present here, an arbitrator's award reinstating an employee accused of sexual harassment without a determination regarding the merits of the allegation violates well-established and dominant public policies concerning sexual harassment in the workplace. Moreover, because Arbitrator Sands demonstrated an unacceptable predisposition towards Leonard and against Stroehmann, the district court did not abuse its discretion in ordering that another arbitrator should be appointed to conduct a *de novo* hearing on the merits of the allegations against Leonard.

I.

On July 18, 1990, Stroehmann filed a complaint against the Union in the United States District Court for the Middle District of Pennsylvania. Stroehmann sought to vacate an award issued by Arbitrator Sands reinstating Leonard, a former Stroehmann employee. Stroehmann discharged Leonard after investigating and determining that he had sexually harassed a customer's employee. This conduct violated a company rule that prohibited immoral conduct while on duty. Stroehmann's complaint asserted that the award should be vacated because it violated a well-defined public policy against sexual harassment in the workplace.

On August 17, 1990, the Union filed an answer and a counterclaim. The counterclaim sought enforcement of the arbitration award.

On December 20, 1990, Stroehmann moved for summary judgment on its complaint and on the Union's counterclaim. The Union filed a cross motion for summary judgment on January 7, 1991 on all claims raised by both parties.

By order entered March 18, 1991, the district court granted Stroehmann's motion for summary judgment, denied the Union's cross-motion, vacated the arbitration award and remanded the mat-

ter for a *de novo* hearing before a different arbitrator. *Id.* at 1190. On April 4, 1992, the Union filed a timely notice of appeal from that order.

II.

Stroehmann employed Leonard as a "store door" driver for about seventeen years. As a "store door" driver, Leonard was to deliver bread products to Stroehmann's customers, usually between the hours of 8:00 p.m. and 9:00 a.m. On November 20, 1989, Stroehmann discharged Leonard for violating a company rule prohibiting immoral conduct while on duty.

The following events led to the discharge. On November 14, 1989, Ken Zimmerman (Zimmerman), the manager of Stauffer's, a Stroehmann customer store in Lititz, Pennsylvania, telephoned Bill Burns, a Stroehmann Key Account Manager, and said that he needed to speak with Steve Garrett (Garrett), Stroehmann's Harrisport Sales Activator, immediately. Garrett and Joe Jacobs (Jacobs), Stroehmann's Harrisport Branch Manager, returned Zimmerman's call later that day. Over the phone, Zimmerman told Garrett and Jacobs that a Stauffer night clerk, Kimberly Wiegand (Wiegand), told her mother that Leonard had sexually harassed her by touching one of her breasts without her consent, pushing himself against her and making explicit sexually charged remarks that were offensive to her while delivering bread to the store on November 12, 1989. Zimmerman learned of the alleged incident through a phone call from Wiegand's mother. Zimmerman said that, as a result of the alleged incident, he no longer wanted Leonard to deliver bread to Stauffer's.

Garrett and Jacobs telephoned Wiegand the same day. The two discussed the alleged incident with Wiegand over a speaker phone. They prepared a report of this conversation, which Wiegand signed two months later. According to the report, after Wiegand let Leonard into the closed store to make a delivery, he told her that he had just had a conversation on his citizen's band radio with two girls about an orgy and that he was excited about the conversation. Wiegand then asked Leonard if he was married. He said that he was. Leonard then added that he had engaged in extramarital sexual intercourse in the past, but that presently he just wanted to feel other women

because he was afraid on contracting AIDS. After unloading his delivery, Leonard picked up an orange and asked Wiegand if her breasts were hard like the orange. Leonard attempted to pull up Wiegand's shirt and she resisted. At that point, Weigand walked to the front of the store to see if the other night employee had arrived and Leonard followed her. When she discovered that the other employee had not yet arrived, Wiegand began walking to the back of the store. Leonard was then in front of Wiegand and told her he knew she was following him so she could "look at [his] ass." Appendix (App.) at 124. Wiegand replied that she was following him in order to let him out of the store and make sure that the door was locked behind him. Then, Leonard moved behind Wiegand and reached around her and grabbed her breasts. She resisted and held the door open for Leonard to leave. Leonard asked if Wiegand was trying to get rid of him, and then told her not to tell her father about the incident because he did not want to jeopardize his friendship with her father. Leonard then left and Wiegand locked the door. Garrett and Jacobs observed that Wiegand was emotionally upset and sobbed during their conversation.

The following day, November 15, 1989, Jacobs telephoned Leonard and asked him to come in to discuss a problem. Leonard asked if he should bring a Union representative and Jacobs told him it was up to him. Leonard arrived at Jacob's office alone. Jacobs, Garrett and Paul Blair (Blair), Leonard's supervisor, presented Leonard with Zimmerman and Wiegand's comments. Jacobs said Leonard denied the allegations, stated that Wiegand was "wacko", and that he would not have done something to jeopardize his marriage. App. at 126. Leonard signed a written statement that Jacobs prepared documenting these responses. He also stated that the allegation concerning the citizen's band radio must have been a lie because his was broken. This comment was not included in the written statement. Although Leonard invited the men to come outside and observe the broken radio, they did not do so. On the written statement Jacobs wrote that Leonard was suspended pending further investigation of the alleged incident.

Jacobs discussed the matter with his superiors and Stroehmann's attorney over the next few days. He also met with Zimmerman on November 17, 1989 to again discuss the matter with him.

On November 20, 1989, Jacobs telephoned Leonard and informed him that he was discharged for violation of a company rule prohibiting immoral conduct while on duty. Immoral conduct is considered a "major offense" which subjects the offender to immediate discharge under longstanding written Stroehmann policy. At that time, Leonard told Jacobs that Wiegand had made unreciprocated sexual advances towards him and that he had rejected them.

Leonard filed a grievance over the discharge pursuant to the Collective Bargaining Agreement (Agreement) between Stroehmann and the Union[1]. In the Agreement, Stroehmann promised it would "exercise the power of discipline and discharge fairly and with regard for the reasonable rights of the employees." App. at 10. The Agreement went on to say "[a]ny employee who has been disciplined or discharged for any reason shall have the right to a hearing under the grievance and arbitration provisions" of the Agreement. *Id.*

Leonard's grievance went to arbitration and an arbitration hearing was held on March 29, 1990 on the question; Was there just cause for Leonard's discharge, and if not, what shall the remedy be? The arbitrator expressly refused to find whether the alleged sexual harassment occurred. Instead, he found that Stroehmann had insufficiently investigated the alleged incident before discharging Leonard. Based solely on this finding, he determined that Leonard was not discharged for just cause and ordered his reinstatement with full back pay less interim earnings.

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1. The Agreement was effective from November 13, 1986 to November 12, 1989. While the alleged harassment occurred on November 12, 1989, the resulting discipline, discharge and arbitration hearing which are the subject of this case did not occur until after that date. Since neither party has raised any issue about the applicability of the Agreement to this case, we will assume the Agreement and its grievance procedure were renewed or continued without material change.

The arbitrator did not reach a conclusion concerning the evidence before him, or the credibility of the witnesses.[2] Nevertheless, he stated that if he had to make a factual determination regarding the occurrence of the incident, he would have to find in favor of Leonard because he had insufficient evidence to determine whether Leonard or Wiegand was more credible.

The district court vacated the award after concluding that there exists a well-established public policy against sexual harassment in the workplace and that the arbitrator's award violated that public policy by ordering reinstatement without a factual finding on the merits of the allegations against Leonard. The district court further remanded the matter for arbitration before a different arbitrator because it also concluded that arbitrator Sands had demonstrated a clear pre-disposition in Leonard's favor and an insensitivity to sexual harassment claims. The district court reached the last conclusion based on its determination that the arbitrator emphasized such irrelevant matters as the alleged victim's social life and appearance and Leonard's marital status, expressed his personal opinions about Stroehmann's sensitivity to sexual matters and ignored Leonard's testimony that he told Wiegand he wished his wife's breasts were hard like an orange.

III.

The district court had subject matter jurisdiction over this case pursuant to Section 301(a) of the National Labor Relations Act. *See* 29 U.S.C.A. §185(a) (West 1978). Section 301 (a) gives federal

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2. In the paragraph introducing his conclusions, the arbitrator states: "On the entire record before me, including my assessments of witnesses' credibility and the probative value of the evidence, I must sustain Leonard's grievance . . . ." App. at 38. This statement cannot be construed to mean that the arbitrator fully considered the evidence and testimonial credibility of the witnesses for the purpose of making a determination on the merits of the allegations against Leonard because the very next sentences emphasize the opposite. They state: "First, it is essential at the outset to eliminate what this decision does *not* involve. It does *not* involve any fine questions of quantum of proof, relative credibility of witnesses, seriousness of charged misconduct, or presence of anti-union animus." App. at 38 (emphasis in original). In addition, the substance of the opinion, read as a whole, strongly indicates that the arbitrator did not consider either the evidence or the witness's credibility and so could not have made an impartial merits determination.

district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce defined in this chapter . . . in any district court of the United States having jurisdiction of the parties." The district court also had federal question jurisdiction. *See* 28 U.S.C.A. § 1331 (West Supp. 1991).

We have appellate jurisdiction over this appeal from the final order of the district court granting summary judgment to Stroehmann pursuant to 28 U.S.C.A. §1291 (West Supp. 1991). Although an order denying a motion for summary judgment is not ordinarily final and appealable under section 1291, it becomes so when accompanied by an order granting a cross-motion for summary judgment. *Nazay v. Miller*, 949 F.2d 1323, 1328 (3d Cir. 1991). Therefore, we also have appellate jurisdiction over the district court's order denying the Union's cross-motion.

We exercise plenary review over this appeal from an order resolving cross-motions for summary judgment. *International Union, United Mine Workers of Am. v. Racho Trucking Co.*, 897 F.2d 1248, 1252 (3d Cir. 1990). Therefore, we apply the same test the district court applied: (1) are there no material facts in dispute; and (2) is one party entitled to judgment as a matter of law? *See* Fed. R. Civ. P. 56(c); *Racho Trucking*, 897 F.2d at 1252.

IV.

The Union argues that the district court erred in the following ways: it determined the means used to reach the award, and not the award itself, violated public policy; it minimized industrial due process concerns, and it incorrectly portrayed the arbitrator as insensitive to sexual harassment claimants, and so biased towards Leonard and against Stroehmann. Thus, the Union seeks reversal of the district court's order because courts cannot vacate a labor arbitration award unless the award itself, not just the means of arriving at it, violates public policy.

It is well settled that courts generally have only a very limited power to review a labor arbitration award by an arbitrator appointed pursuant to a collective bargaining agreement. *See United Paper-*

*workers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364, 370 (1987); *W. R. Grace & Co. v. Local 259, International Union of the United Rubber Workers*, 461 U.S. 757, 764 (1983); *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596, 598-99 (1960). If it were otherwise, the Congressional objective of settling labor disputes by arbitrators expert in industrial practices and customs would be undermined. *See Enterprise Wheel*, 363 U.S. at 596. Full-blown judicial review of labor arbitrators' decisions would likewise annul the bargain of the parties for an arbitrator's construction of their collective bargaining agreement instead of a court's. *Id.* at 599. Broad court review would render the arbitrator's decision practically meaningless, as it would almost never be final. *Id.* Therefore, as long as the arbitrator's award is drawn from the essence of the collective bargaining agreement, a court may not vacate it even if the court finds the basis for it to be ambiguous or disagrees with its conclusions under the law. *Id.* at 597-98.

Nevertheless, there are exceptional situations in which courts do review the merits of labor arbitration awards. One such situation is based on the general principle that courts may not enforce contracts which are contrary to public policy. *See Grace*, 461 U.S. at 766. Since collective bargaining agreements are contracts, courts may not enforce them in a manner that is contrary to public policy. Accordingly, if an arbitrator construes a collective bargaining agreement in a way that violates public policy, an award based on that construction may be vacated by a court. *See id.*

This exception, though, does not give courts broad discretion to vacate arbitration awards based on general considerations of supposed public policy. *See Misco*, 108 S. Ct. at 373. Courts may only vacate arbitration awards which explicitly conflict with well-defined, dominant public policy. *Id.* A public policy is well-defined and dominant if it may be ascertained from law and legal precedent. *Id.*

There is a well-defined and dominant public policy concerning sexual harassment in the workplace which can be ascertained by reference to law and legal precedent. Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a)(1) (West 1981), prohibits employment discrimination on the basis of sex. The Supreme Court

of the United States has interpreted this prohibition to include sexual harassment in the workplace which has either an economic effect on the complainant, or creates a hostile or offensive work environment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-67 (1986). The Equal Employment Opportunity Commission (EEOC) has promulgated a regulation that elaborates what constitutes sexual harassment under Title VII:

> Harassment on the basis of sex is a violation of [42 U.S.C.A. § 2000e-2(a)(1)]. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

29 C.F.R. § 1604.11(a) (1991) (footnote omitted). In further explanation, the EEOC has published this Guideline:

> [U]nwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.

EEOC Policy Guidance: Sexual Harassment, N-915.035, *quoted in Newsday, Inc. v. Long Island Typographical Union, No. 915*, 915 F.2d 840, 844 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991). It is clear that there is a well-defined, dominant public policy against sexual harassment in the workplace and that behavior such as that alleged by Wiegand is considered sexual harassment under the law.

In addition to the public policy against sexual harassment in the workplace, a well-defined, dominant public policy favoring volun-

tary employer prevention and application of sanctions against sexual harassment in the workplace exists. The Supreme Court recognized this important public policy in both *Grace* and *Misco*. *See Misco*, 108 S. Ct at 373; *Grace*, 461 U.S. at 770-71. An EEOC regulation on the matter states:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all the steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressly strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (1991). The Guidelines further provide that employers should create a procedure to encourage alleged sexual harassment victims to come forward and seek to resolve their complaints. *EEOC Policy Guidance*, *supra* at N:4028, *quoted in Newsday*, 915 F.2d at 845. Stroehmann's actions following Wiegand's allegations observed and advanced this public policy.[3]

Under the circumstances present here, an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy. Therefore, Arbitrator Sands construed the Agreement between the parties in a manner that conflicts with the well-defined and dominant public policy concerning sexual harassment in the workplace and its prevention. His award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred. Certainly, it does not discourage sexual harassment. Instead, it undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace. For these reasons, we conclude that reinstatement of this employee without a determination of the merits of the allegation violates public policy.

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3. In addition to the pertinent federal law cited, the Commonwealth of Pennsylvania has enacted a similar law. *See* Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 955(a) (1991).

Both the United States Courts of Appeal for the Second and Tenth Circuits have reviewed arbitration awards reinstating employees discharged for sexual harassment. Nothing in those opinions counsels against our holding today. Indeed, they support it.

In *Newsday*, 915 F.2d at 843, the arbitrator reinstated an employee after finding that he had committed sexual harassment more than once. The arbitrator had decided that the medicine of discipline should be administered in progressively more severe doses and discharge was too strong a dose for this stage of the employee's disease. The Second Circuit overturned the award as violative of public policy under *Misco* because it returned a known sexual harasser to the workplace, so perpetuating a hostile and offensive work environment and inhibiting the employer from performing its duty to prevent sexual harassment. *See id.* at 843-45.

In *Communication Workers v. Southeastern Elec. Coop.*, 882 F.2d 467, 468 (10th Cir. 1989), however, the court refused to vacate an arbitrator's award reinstating an employee discharged for sexual harassment. There, the arbitrator concluded that the discharged employee had committed sexual harassment only one time, but was penitent and apologetic about it, and his record was otherwise unblemished. *Id.* at 468-69. He therefore concluded that suspension without pay, not discharge, was the appropriate discipline. The court expressly noted that the arbitrator had incorporated the public policy against sexual harassment into his reasoning in reaching his decision. *Id.* at 469. It decided to uphold the award in deference to arbitration decisions in labor cases, despite recognizing the public policy exception to court review of labor arbitration awards and the well-defined and dominant public policy concerning sexual harassment in the workplace. Under *Enterprise Wheel*, that principle of deference is especially strong with respect to an arbitrator's formulation of remedies. *See id.* at 470 (quoting *Enterprise Wheel*, 363 F.2d at 597). The arbitrator in *Communications Workers* determined the merits of the charge after full consideration of the evidence and the credibility of the witnesses before him and did impose some discipline on the employee. *Communications Workers* does not stand for the pro-

position that objectively unwelcome sexual advances can be ignored by a labor arbitrator. The Tenth Circuit merely deferred to the arbitrator's choice of remedy.[4]

Arbitrator Sands studiously avoided the charges against Leonard and did none of the things the arbitrator did in *Communications Workers*. Arbitrator Sands did not consider either the evidence or the credibility of the witnesses before him. He did not make a finding on the merits of the sexual harassment allegation, and he neither considered nor respected the pertinent public policy.

The dissent claims we misapprehend the arbitrator's decision. The dissent says:

> His opinion explicitly suggested that there was not a sufficient basis to believe Kimberly Wiegand's allegations: 'If Stroehmann's investigation had been at all consistent with the severity of Wiegand's accusations and of their consequences for Leonard's life *and* if that investigation had provided an *adequate basis* to believe that Leonard had behaved as charged, Stroehmann's discharge decision would have been unassailable.' (emphasis added). In finding that Stroehmann's discharge decision would have been unasssailable had it had an adequate basis, the arbitrator implicitly held that there was an inadequate basis for the charge of sexual harassment.

Dissent Typescript at 4. The dissent is wrong. In reaching its conclusion regarding the scope of the arbitrator's decision it fails to mention the sentences immediately preceding and the paragraph subsequent to the language it quotes. The preceding sentences state: "First, it is essential at the outset to eliminate what the decision does *not* involve. It does not involve any fine questions of quantum of proof, relative credibility of witnesses, seriousness of charged misconduct, or presence of anti-union animus." App. at 38. (emphasis in original).

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4. *See also Chrysler Motors Corp. v. Allied Industrial Workers*, Nos. 90-1423, 90-1804, 1992 WL 65656 (7th Cir. Apr. 3, 1992) (an arbitrator's decision to reinstate an employee discharged for sexual harassment after finding that he had committed sexual harassment, but that he could be rehabilitated, and therefore that a less severe punishment was appropriate, does not violate public policy).

The subsequent paragraph states in relevant part: "Second, what *is* involved in this case is the absolute insufficiency of Stroehmann's response to the information its management received on November 14th from Zimmerman and Wiegand." App. at 39 (emphasis in original).[5]

Arbitrator Sands' interpretation of the Agreement's clause relating to industrial due process neither considered nor respected public policy. Instead, his interpretation violated it.

The district court did not exceed its narrow power to review an arbitrator's findings of fact or his interpretation of the meaning of this collective bargaining agreement's provisions. Moreover, the district court did not substitute judicial opinion for an arbitrator's decision in contravention of the parties' Agreement. The district court did not rule on either the merits of the allegations or impose the remedy it thought appropriate. Instead, it simply vacated the award as violative of public policy and remanded the matter for a redetermination in light of that public policy.

The Union misunderstands the rationale for the district court's holding when it argues that the court improperly found the means used to reach the award, and not the award itself violated public policy. The district court held that the award itself violated public policy because the award would have reinstated Leonard without determining the merits of the allegations against him. That holding is proper because an award of full reinstatement without findings on what Leonard did violates the strong public policy against prevention of sexual harassment in the workplace. The Union's first argument lacks merit.

The Union's next argument that the district court did not give enough weight to industrial due process concerns is also meritless. When arbitrators interpret collective bargaining agreements containing broad clauses that require employers to follow fair procedure before disciplining employees, they consistently give meaning to those clauses by applying the concept called "industrial due pro-

5. For the reasons set out above, we do not think Stroehmann's response was "absolutely" insufficient given the nature of the charges. *See* typescript at 21-22.

cess." *See Chauffeurs Local Union No. 878 v. Coca-Cola Bottling Co.*, 613 F.2d 716, 719 (8th Cir.) *cert. denied*, 446 U.S. 988 (1980). Though the concept of industrial due process is not easy to define exhaustively, its use is standard practice in interpreting general provisions in collective bargaining agreements that require fair discipline procedures.[6] *See id.* at 720. Generally, in applying industrial due process to particular cases, labor arbitrators insist on similar punishments for similar offenses and require employers to give employees advance notice and an opportunity to respond to the charges against them before discipline is imposed. *See, e.g., id.* at 720 (*citing* Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 921 (1979)). Arbitrators also hold that if the employee was not given an opportunity to respond, or key witness were not present to testify at the arbitration hearing, industrial due process has been violated. *Id.* at 720 n.2 (*citing* Jennings and Wolters, *Discharge Cases Reconsidered*, 31 Arb. J. 164, 178 (1976)). We recognize the importance of industrial due process in the workplace and in the day-to-day administration of the labor contracts there, but nothing the Union has presented to us, nor that we have discovered through our own research demonstrates that Stroehmann did not respect it.

Stroehmann gave Leonard a chance to respond to the charges against him; Leonard had notice that the conduct charged could result in discharge; Leonard was informed of the source of the charge against him; and Jacobs told Leonard that he could bring Union representatives to the meeting in which he was first confronted with the charges against him, but he chose not to do so. Additionally, Stroehmann investigated the charges against Leonard by discussing the incident with Wiegand, the only eyewitness, and all key witnesses testified at the arbitration hearing. The arbitrator's conclusion that Stroehmann denied Leonard industrial due process is unfounded. We disagree with the statement in the dissent that the decision to

6. Some examples of provisions that trigger analysis in terms of industrial due process are clauses which merely state the discipline must be for "just cause," *see, e.g., Chauffeurs*, 613 F.2d at 718, or, as the Agreement between the Union and Stroehmann, merely state that the employer must be "fair and reasonable," *see App.* at 10.

suspend before confrontation evidences "prejudgment." Dissent Typescript at 15. This is not a case in which the employer acted without affording the employee any opportunity to tell his version of events. While it is true that Stroehmann decided to suspend Leonard pending further investigation before management spoke to him, the decision to discharge Leonard was not made until after he gave his version of the incident and the employer's investigation was completed. Even then, Leonard was given a second opportunity to tell his side of the story. Given that opportunity, his only reponse was that he could not have been listening to erotic CB conversation because his CB radio was broken. The broken radio would be evidence that he had not been listening to such conversations. It is not evidence that he did not tell Wiegand he had been doing so. Therefore, the dissent's reference to Stroehmann's refusal of Leonard's request that management verify this by examining the radio is puzzling.

The cases the Union cited for the Court at oral argument stand for the unobjectionable general proposition that arbitrators' awards that reinstate discharged employees are not subject to judicial interference if the employer did not afford the employee industrial due process. In *Chauffeurs*, 613 F.2d at 717, and *Federated Dep't Stores v. United Food & Commerical Workers Union, Local 1442*, 901 F.2d 1494, 1495 (9th Cir. 1990), the employers gave the employees no opportunity to respond to the charges against them. In *Super Tire Eng'g Co. v. Teamsters Local Union No. 676*, 721 F.2d 121, 122-123 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984), we upheld an arbitrator's award reinstating an employee because he was fired without notice that he could be discharged for the one offense he committed, though the arbitrator found that he did commit the offense. In *Safeway Stores, Inc. v. United Food Workers Union, Local 400*, 621 F. Supp. 1233, 1236 (D.D.C. 1985), the arbitrator's award reinstated an employee because of the employer's industrial due process violation in not informing the employee of all the sources of the charges against him until after he was discharged. Finally, in *Anaconda Co. v. District Lodge No. 27 of the Int'l Ass'n of Machinists*, 693 F.2d 35, 36 (6th Cir. 1982), an arbitration award was upheld reinstating an employee because he was not allowed union

representation when the charges against him were presented to him though he requested such representation. These cases are inapposite because, as we have already concluded, Stroehmann did not reach its decision to discharge Leonard without respecting industrial due process.[7]

The Union also argues that the district court should not have vacated the award because it based its holding on an incorrect conclusion that the arbitrator was biased towards Leonard particularly and against sexual harassment claimants generally. On the issue of general bias, we agree with the Union that Stroehmann and the district court took some of the arbitrator's comments out of context and exaggerated them. The district court did not vacate the arbitration award on the rationale that the arbitrator was biased. It vacated the award on the ground that it violated public policy concerning sexual harassment in the workplace, not because it determined the arbitrator to be biased. *See Stroehmann Bakeries*, 762 F. Supp. at 1190.

Because the district court relied on some comments of the arbitrator that might have exaggerated his bias because they were taken out of context, the question remains whether its remedy of a remand of the matter for a *de novo* hearing before a different arbitrator is proper. While that question is more difficult to answer, its proper resolution is affected by our scope of review. We review a district

7. The writer of this opinion believes this case could be decided on an alternate ground. Even if Stroehmann did not fully afford Leonard industrial due process, the writer believes that failure cannot completely override all other public policy concerns. In this respect, he would be careful to distinguish the concept of industrial due process from due process as required by the Constitution. The writer further believes that the Supreme Court's public policy exception to the general rule against court review of the merits of a labor arbitration decision implies that a labor arbitrator's concept of industrial due process does not override a difinitive public policy. *See Misco*, 108 S. Ct. at 370-71. Thus, he concludes that a lack of full industrial due process, had it occurred, would not provide a reason for reversing the district court's order vacating Arbitrator Sands' award of reinstatement of Leonard. Because the writer also believes, however, that Leonard was afforded industrial due process here, he is in full accord with the disposition of this case on the rationale that industrial due process was not violated.

court's selection of a remedy for abuse of discretion. *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 807 F.2d 330, 334 (3d Cir. 1986).

After careful consideration, we have concluded that the district court did not abuse the discretion it had to formulate an appropriate remedial order because the record shows Arbitrator Sands was biased or partial towards Leonard. Although he may not have demonstrated general bias against all persons claiming sexual harassment, his partiality in this case is demonstrated by his behavior and comments during the hearing. Arbitrator Sands referred to the fact the Wiegand weighed 224 pounds and had no social life, and he characterized her as "unattractive and frustrated." App. at 32, 41. He allowed Leonard's attorney, over objection, to ask Jacobs: "Would you think an average man would make a pass at a woman like that?" and "Would you think an average man or yourself would make a pass at a woman that weighs 225 pounds?" App. at 174-75. Arbitrator Sands also cavalierly dismissed Zimmerman's reasons for finding Wiegand credible, *i.e.*, that she was "bashful" and "very Christian." App. at 36. Finally and inexplicably, Arbitrator Sands disregarded Leonard's admission that he made sexual comments to Wiegand about his wife's anatomy. App. at 176, 185-86. Despite that admission, he determined:

> [N]one of [that] would have been culpable under or inconsistent with Stroehmann's rules, acceptable standards of social intercourse, or what Wiegand and Leonard's bantering business relationship had been.

App. at 36. Lastly, Arbitrator Sands also stated that if he had to make a decision on the merits he would find in Leonard's favor, even though he had previously made it clear that he had not fully considered the evidence on the employer's charge that Leonard had made improper sexual advances to and committed a battery against Wiegand. App. at 38, 40. There is no sound reason to defer to Arbitrator Sands' award. His partiality towards Leonard is sufficient to support the district court's choice of an order directing Leonard's grievance be submitted to a different arbitrator for a *de novo* hearing as an appropriate remedy in this case. The indications of bias

in this case are such that we are unable to say the district court abused its discretion in directing a remand to a different arbitrator. *See Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752. 754 (3dCir. 1982) (citing *Ludwig Harold Mfg. Co. v. Fletcher*, 405 F2d 1123, 1128-29 n.27 (3d Cir. 1969)) ("An award may be vacated where it is shown that there was . . . partiality . . . on the part of the arbitrator.").

V.

There is no genuine disputed issue of material fact and Stroehmann is entitled to judgment as a matter of law. The district court properly concluded that the arbitration award violates public policy. The arbitrator was unacceptably predisposed towards Leonard and against Stroehmann. Thus, the remand to a different arbitrator is proper as well. Accordingly, we will affirm the district court's order granting Stroehmann's motion for summary judgment, denying the Union's cross-motion for summary judgment, and vacating the arbitration award and remanding the matter for a *de novo* hearing before a different arbitrator.[8]

BECKER, *Circuit Judge*, dissenting.

The majority has penned a powerful statement of the public policy against sexual harassment. I agree with the majority's vigorous condemnation of behavior of the sort that allegedly occurred at the Stouffer's (sic) store in Lititz on November 12, 1989, and I applaud the court's recognition of the importance of vindicating the rights of women in the workplace. I respectfully submit, however, that in its zeal to advance that public policy, the majority has committed two fundamental errors that seriously undermine its position. First, the majority has given short shrift to the industrial due process rights of Samuel Leonard. In my view, Stroehmann's egregious failure to provide Lenoard with the procedural protections guaranteed by the collective bargaining agreement justifies his reinstatement.

8. Our holding does not, as the dissent states, transfer from labor arbitrators to the judiciary the power to decide grievances arising under collective bargaining agreements nor does it require the employee to disprove all allegations of sexual harassment that may be made against him. It does permit an unbiased arbitrator to decide impartially whether the allegations against Leonard are true or false, and if true, whether the appropriate discipline is discharge.

Second, I believe that the majority mischaracterizes the basis for the arbitrator's decision to reinstate Leonard and hence finds violations of public policy and arbitrator bias where neither exists. As I read the arbitrator's opinion, he apparently believed that Leonard was telling the truth, was outraged by Stroehmann's disregard for procedures that it was obligated to respect under its collective bargaining agreement, and found insufficient evidence that any sexual harassment had in fact occurred. The arbitrator consequently ruled that Stroehmann had failed to carry its burden of demonstrating just cause for discharge and ordered that Leonard be reinstated. This run of the mill arbitration award was not only perfectly appropriate and well within the arbitrator's discretion, but is subject only to an exceedingly narrow scope of judicial review.[1]

With all due respect to the majority, I suggest that, even when public policy is involved in a discharge case, arbitrators must begin at the beginning — with fair proceedings and fact findings. Stroehmann did not conduct such fair proceedings and fact findings here and was hence unable to carry its burden of proof to show just cause for discharge at the arbitration hearing. The majority opinion essentially requires Leonard to *disprove* the allegations against him, a requirement which, in my view, constitutes an unfair shifting of the burden of proof. I would therefore reverse the order of the district court and reinstate the arbitrator's award.

Further, I disagree with the majority's affirmance of the remand of this matter to a different arbitrator. The majority concedes that the district court, in justifying its decision to remand to a different arbitrator, took several of the original arbitrator's comments out of context. Nevertheless, the majority asserts that it cannot disturb the district court's discretionary choice to remand to a different arbitrator. I believe that the arbitrator's opinion, no matter how carefully dissected, does not reveal any bias. Additionally, the majority sets

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1. I have previously criticized the exceedingly narrow review we have given to arbitral awards, see *News America Publications Inc. Daily Racing Form Division v Newark Typographical Union, Local 103*, 921 F2d 40, 41 (3d Cir 1990) (Becker, Statement Sur Denial of Rehearing In Banc) (arguing that the narrow scope of review of arbitral awards effectively gives "all power to the arbitrators," id at 42), but I am bound by our precedent.

another troubling precedent when it relies on the arbitrator's alternate ground for decision — that is, that no sexual harassment in fact occurred — to demonstrate arbitrator bias. By so deciding, the majority will allow district courts in future arbitration cases to remand to different arbitrators (and implicitly find arbitrator bias) simply because arbitrators have given alternate grounds for their decisions.

For these reasons, I respectfully dissent.

I.

My disagreement with the majority begins with its recitation of the facts and with its description of the arbitration process. Two aspects of the majority's factual account merit elaboration.

A. *The Arbitrator's Decision*

In my view, the majority mischaracterizes what the arbitrator found in deciding to reinstate Leonard. The majority concludes that the arbitrator refused to decide whether the sexual harassment against Wiegand actually occurred. It derives this conclusion from, among other things, "the substance of the opinion, read as a whole." Majority Opinion, Typescript at page 9 note 2. With all respect, the majority misapprehends what the arbitrator decided.

The arbitrator expressly stated his view at numerous points that there was insufficient evidence to find that sexual harassment had in fact occurred. His opinion explicitly suggested that there was not a sufficient basis to believe Kimberly Wiegand's allegations: "If Stroehmann's investigation had been at all consistent with the severity of Wiegand's accusations and of their consequences for Leonard's life *and* if that investigation had provided an *adequate basis* to believe that Leonard had behaved as charged, Stroehmann's discharge decision would have been unassailable." (emphasis added).[2] In finding

2. In discussing my characterization of the arbitrator's opinion, the majority states, "The dissent is wrong." Majority Opinion at — [Typescript at 18]. The majority bases its conclusion on the surrounding sentences of the arbitrator's opinion in which the arbitrator stated that he was not required, under the circumstances, to weigh the evidence and evaluate the credibility of the witnesses. I find the ma-

*(continued)*

that Stroehmann's discharge decision would have been unassailable had it had an adequate basis, the arbitrator implicitly held that there was an inadequate basis for the charge of sexual harassment.[3]

The remainder of the arbitrator's opinion also suggested that he found the charge against Leonard unsubstantiated. He (correctly) characterized the information on which Stroehmann relied in making its discharge decision as "double hearsay." He also stated quite clearly that if the issue of resolving the credibility of witnesses were before him, "Stroehmann would have had to lose for having failed to bear its burden of proof." In short, contrary to the implication of the majority opinion, the arbitrator did not refuse to find whether sexual harassment occurred. Rather, he found 1) that Stroehmann

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*(continued)*

jority's conclusion somewhat puzzling in this regard because elsewhere in its opinion, the majority appears to agree with my reading of the arbitrator's opinion: "[H]e stated that if he had to make a factual determination regarding the occurrence of the incident, he would have to find in favor of Leonard because he had insufficient evidence to determine whether Leonard or Wiegand was more credible." Majority Opinion at —. [Typescript at 9]. Because Stroehmann had the burden of demonstrating just cause for discharge under the agreement, its failure to demonstrate Wiegand's credibility required the arbitrator to find for Leonard. At the very least the surrounding sentences do not undermine the clear import of the arbitrator's views.

3. I note in this regard that the majority opinion fails to address the inconsistencies in Wiegand's underlying story, which would tend to exculpate Leonard. The majority suggests that there is no dispute about what Wiegand says occurred on November 12, 1989. In fact, the record reflects at least two different versions of the facts, related at different times by Wiegand. In one story, told to her mother, Wiegand alleged that Leonard sexually harassed her after he had finished delivering all of his products, and the harassment consisted of pushing against her and grabbing her breast. In the other version, told to Stroehmann officials Steve Garrett and Joe Jacobs, the sexual harassment began immediately upon Leonard's arrival in the store. The second version contained details omitted from the first version, including a discussion of an erotic CB radio conversation and comparisons of the firmness of her breast to an orange.

My point is not that one of these incidents would constitute sexual harassment and one would not. Nor is it to suggest that Wiegand was fabricating her story. The inconsistency in the underlying alleged facts does suggest, however, that because of the shoddy manner in which Stroehmann conducted its investigation. Stroehmann might not have satisfied its burden of proof under the "just cause" section of the collective bargaining agreement.

had not complied with the requirements of the collective bargaining agreement because it had not adduced sufficient evidence to discharge Leonard under the just cause provision of the collective bargaining agreement and 2) there was an inadequate basis for believing that the sexual harassment had in fact occurred.

B. *Requirements of the Collective Bargaining Agreement*

The majority opinion does not contain an extensive discussion of the salient requirements of the collective bargaining agreement that governed the severance of the employment relationship. It is therefore important to note that the agreement required that "higher management . . . investigate and collect the facts before a final and official dismissal is declared." As I read the record, no such investigation took place. The arbitrator's finding that the investigation of Leonard was insufficient in light of Stroehmann's failure to honor its obligations under the collective bargaining agreement therefore seems perfectly in accord with the arbitrator's obligations in construing the agreement, regardless of whether sexual harassment in fact occurred.

II.

I agree with the majority's statement that courts owe broad deference to arbitrators in the construction of collective bargaining agreements. Indeed, the Supreme Court has held that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers International Union v Misco*, 484 US 29, 108 S Ct 364, 371 (1987). I also agree with the majority that courts may review arbitrators' awards to ensure that those awards are consistent with public policy. I believe, however, that the majority's abbreviated discussion of the narrow contours of that review leads it into error, and I therefore discuss briefly my understanding of the scope of our review.

As the Supreme Court has held, the ability to review arbitrators' awards for violations of public policy "does not . . . sanction a broad judicial power to set aside arbitration awards as against public

policy.'' Id at 373. *Misco* made clear that the mere showing that a public policy was implicated in the decision to discharge an employee is not sufficient to reverse an arbitrator's award. Rather, the award itself must contravene public policy. As the Court stated in *Misco:*

> [A] court's refusal to enforce an arbitrator's interpretation of such contracts is limited to situations where the contract as interpreted would violate ''some explicit public policy that is well-defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' ''

Id at 373.

In *United States Postal Service v National Association of Letter Carriers, AFL-CIO,* 839 F2d 146 (3d Cir 1988), decided in the wake of *Misco,* we defined more specifically the limited contours of judicial review of arbitrators' decisions:

> [T]he Court in *Misco* delimited the methods by which a public policy and its contravention are to be ascertained. *Misco* specifically rejected, as exceeding the court's reviewing authority, techniques employed by a district court in: (1) asserting a public policy without substantiating its existence within existing laws and legal precedents, and thereby failing to distinguish its pedigree as a 'well defined and dominant' policy as opposed to a 'general consideration of supposed public interests;' (2) second-guessing the arbitrator's factfinding particularly insofar as the conclusion that the asserted public policy would be violated by the employee's reinstatement depends on drawing factual inferences not made by the arbitrator; (3) second-guessing the arbitrator's reasonable construction of the 'just cause' clause, and the rules of evidence and procedure appropriate to a 'just cause' determination under the collective-bargaining agreement.

Id at 148. *Postal Service* thus prohibits setting aside arbitrator's awards: 1) when there is no showing that a dominant and well-defined public policy exists; 2) when a judicial finding that the public policy

would be violated relies on inferences of fact not made by the arbitrator; and 3) when a court's finding that a public policy has been violated is, in actuality, merely a disagreement with the arbitrator's construction of a just cause provision. Thus, in reviewing arbitrator's decisions, we must do more than merely ascertain that a genuine public policy is involved. We must also determine, based on facts that the arbitrator has found, that the award would violate public policy.

III.

The majority has faithfully complied with the requirement of ascertaining a dominant and well-defined public policy. As its opinion details, a public policy against sexual harassment in the workplace can readily be derived from federal statutes and regulations as well as from judicial decisions. I agree that if the public policy against sexual harassment were offended by this arbitrator's decision, the award could not stand.

My agreement with the majority ends there, however. The majority's opinion rests on inferences of fact not made by the arbitrator and, at bottom, quarrels with the arbitrator's construction of the just cause provision. Although the public policy against sexual harassment is tossed loosely about in the majority's opinion, it is crucial to understand what is *not* at stake in this case. The majority's opinion cannot claim, based on this record, that Leonard is likely to commit sexual harassment again (if he ever has) if he is reinstated[4]. Nothing in the arbitrator's factfinding, or, indeed, in the entire record, suggests that Leonard would ever again (if he ever has) sexually harass another woman.[5]

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4. In a brief aside, the majority asserts that the award "would . . . let a person who may again commit sexual harassment back into the workplace without deterrence or protection for co-workers." See Majority Opinion at — [Typescript at 15]. There is not a shred of evidence in the record that Leonard would engage in sexual harassment upon reinstatement, and the majority's bald assertion does not support its position.

5. That fact makes this case plainly distinguishable from *Newsday, Inc. v Long Island Typographical Union, No. 915*, 915 F2d 840 (2d Cir 1990). In *Newsday*, an employer suspended an employee for sexual harassment. An arbitrator sustained the suspension and held that any further incidents of harassment would lead to

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Instead, the majority finds a violation of public policy in the arbitrator's failure to make a conclusive determination whether such harassment occurred. As I have already suggested, I believe that the arbitrator made the best possible determination that he could about whether any harassment occurred, and concluded that it did not. See pages — [Typescript pages 4-7]. That is sufficient, in and of itself, to uphold the arbitrator's award. Even assuming, however, that the arbitrator made no determination about harassment, the majority must demonstrate why his failure to do so violates public policy. Nothing in the record suggests that the award will directly promote further sexual harassment by Leonard; therefore, the public policy in favor of discouraging sexual harassment itself is not implicated.

Rather, the majority holds that "an arbitrator's award reinstating an employee accused of sexual harassment without a determination regarding the merits of the allegation violates well-established and dominant public policies concerning sexual harassment in the workplace." Majority Opinion at —, [Typescript at page 3]. This public policy analysis is deeply flawed. At the outset, I cannot see how guaranteeing procedural fairness to employees accused of sexual harassment can violate the public policy against sexual harassment. It is merely an extension of the arbitration principle that

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*(continued)*

discharge. After this initial arbitration, the employer discharged the same employee after more complaints of sexual harassment had been made against him. Id at 842. At the second arbitration, the arbitrator specifically found that these repeated incidents of sexual harassment had, in fact, occurred. Id at 843. The arbitrator acknowledged that reinstatement might possibly lead to further incidents of sexual harassment but decided that, in the event further incidents occurred, they would lead to the employee's discharge. In so deciding, the second arbitrator ignored the first arbitrator's command that any further incidents of sexual harassment should lead to discharge. The Second Circuit held that, in light of the earlier ineffective warning and in light of the likelihood of further sexual harassment, reinstatement of the employee would violate public policy.

In this case, there has never been a *finding* that Leonard sexual (sic) harassed anyone. As I have explained, there was an implicit finding that no such sexual harassment occurred. Even if there were such a finding of past behavior, however, there is no indication in this record that Leonard's reinstatement is likely to lead to further sexual harassment. Therefore, unlike *Newsday*, the public policy against sexual harassment per se is not offended by reinstating Leonard.

employees accused of any wrongdoing are accorded fair treatment and protected from the impulses of their employer.

Further, and more egregiously, the majority's holding skews the rules governing arbitration of claims of sexual harassment against an employee. If an employee is accused of sexual harassment and cannot conclusively disprove its occurrence, the majority would find a violation of public policy if that employee is reinstated. This effectively shifts the burden of proof to the accused employee. I do not believe that placing such a burden on accused employees is required or justified by the public policy against sexual harassment. Moreover, I believe that such a practice would directly contravene the just cause clause for which the parties have bargained.

The majority attempts to narrow its holding by confining it to "the circumstances present here," see Majority Opinion at pages —, [Typescript at 3, 15]. There is however, no logical reason why this case will differ from any future case where a company accuses an employee of some offense violative of public policy that the employee cannot disprove at arbitration. If the majority believes this case to be unique because the arbitrator was biased, then the case can be resolved on the basis of his bias along without reference to public policy. See *Misco*, 108 S Ct at 371 (noting that arbitration decisions resulting from fraud or arbitrator dishonesty and fraud can be set aside). The majority, however, relies heavily on public policy, and because there is no analytic difference between this case and future cases where companies allege that employees have committed acts violative of public policy which cannot be conclusively proven or disproven, the employee, under the majority's logic, might retain the burden in this circuit to disprove the occurrence of the act which is said to violate public policy.

The majority's holding is unprecedented, and its effort to distinguish prior cases is unpersuasive. Indeed, two recent cases strongly militate against the majority's conclusion. In *Communications Workers of America v. Southeastern Electric Cooperative*, 882 F2d 467 (10th Cir 1989), the Tenth Circuit upheld an arbitrator's award reinstating after a period of suspension an employee who had undisputedly engaged in sexual harassment. The court held that it

could not disturb the arbitrator's award despite the fact that a known sexual harasser would eventually be allowed to return to the workplace. The Seventh Circuit reached a similar conclusion in *Chrysler Motors v. International Union, Allied Industrial Workers of America*, 959 F2d 685 (7th Cir 1992). In *Chrysler*, an employee had undoubtedly engaged in egregious sexual harassment. The company discharged the employee, but the arbitrator reduced the penalty to a thirty-day suspension. Essentially rejecting the argument that the majority makes here, the Seventh Circuit found no violation of public policy despite the employee's reinstatement after the company had overwhelmingly established that sexual harassment had occurred. Here, the majority finds it a violation of public policy for an arbitrator to reinstate an accused sexual harasser, against whom a case of sexual harassment could not be proven. If those who have sexually harassed can return to work without contravening public policy, certainly those against whom there is an insufficient basis to prove sexual harassment can also return to work without contravening public policy.

Our own precedents compel the same conclusion. In *Postal Service*, 839 F2d at 149, we upheld an arbitrator's award reinstating an employee who had fired a gun at his employer's car. We approved that award as consistent with public policy because "[a] judgment about the offending employee's amenability to discipline comes under the scope of the arbitrator's factfinding authority . . ." Id at 149. Even though the employee was arguably likely to commit other acts of violence against employees, we did not find a contravention of public policy. Similarly, in this case, where no sexual harassment has been found in the first place, I would hold that we should defer to the arbitrator — who has evaluated the credibility of witnesses and evaluated what, if any, discipline is appropriate — to reinstate Leonard.

## IV.

Nor is the majority content to find a public policy violation and invalidate the award of the arbitrator on that basis. The majority, in the name of public policy, intrudes on what courts have repeatedly reserved for the arbitrators and reverses the arbitrator's award

because it finds unreasonable the arbitrator's construction of the just cause provision.

As the majority acknowledges, arbitrators have repeatedly relied on the doctrine of industrial due process in construing just cause provisions. See generally Frank Elkouri and Edna Asper Elkouri, *How Arbitration Works* 673 (Bureau of National Affairs 1985). That doctrine is well-established in the jurisprudence of labor arbitration, see id at 673 n116 (collecting cases), and in federal labor jurisprudence, see *Super Tire Engineering Co v Teamsters Local Union No. 676*, 721 F2d 121, 124-25 (3d Cir 1983); *Federated Dep't Stores v. United Food & Commercial Workers Union, Local 1442*, 901 F2d 1494, 1497 (9th Cir 1990). In this case, the arbitrator made clear in his opinion his belief that the collective bargaining agreement required Stroehmann to do two things that it failed to do in this instance: 1) to conduct a high-level management investigation with procedural protections for Leonard; and 2) to carry its burden of proof and demonstrate that the harassment had occurred.

The majority states its belief that Stroehmann afforded Leonard ample due process in its discharge decision. I believe that the facts clearly demonstrate otherwise. Under the collective bargaining agreement, Leonard was entitled to a thorough investigation of the charges against him by high-level management which he never received. Also, Stroehmann officials admitted at the arbitration hearing that they had made the decision to suspend Stroehmann before ever hearing his version of the story. As if the prejudgment were not troubling enough, Stroehmann officials refused to consider what may have been the most significant (and perhaps the only) objective evidence in the case — the broken CB radio. Immediately upon being told of Wiegand's charge against him, Leonard told Stroehmann officials that Wiegand's description of Leonard's tale of an erotic conversation over the CB radio was demonstrably false because his CB was broken. Leonard stated that he had offered Stroehmann officials the opportunity to inspect it, which they declined. Additionally, as I have noted above, there were inconsistencies in Wiegand's story that Stroehmann chose to ignore. See note 3. These undisputed facts point to the conclusion that Leonard was deprived of industrial due process.

Even assuming that the investigation was adequate, however, Stroehmann did not carry its burden at the arbitration of showing that Leonard was discharged for just cause. The arbitrator found that the collective bargaining agreement required Stroehmann to provide sufficient evidence for a "supportable judgment" to demonstrate that the harassment had occurred. The arbitrator, to whom we owe complete deference in factfinding in the absence of fraud or dishonesty, see *Misco*, 108 S Ct at 371, found that the facts were inadequate to support a judgment that sexual harassment had occurred.

At all events, even if, after *de novo* review, we believed that Leonard had been afforded sufficient due process and Stroehmann had proven its case, we would still not be entitled to reverse the arbitrator's award. As *Misco* makes clear, we owe deference to the arbitrator when he is even arguably construing the collective bargaining agreement. Id. There can be no doubt that the arbitrator in this case articulated what he believed was required by the collective bargaining agreement. That interpretation and his factfinding cannot be disturbed absent a showing that the decision was procured "through fraud or through the arbitrator's dishonesty . . ." Id. No such showing was made, and the majority does not so argue.

In sum, despite the fact that precedent requires overwhelming deference to the arbitrator, the majority articulates no reason why such deference should not be accorded in this case, except that an important public policy principle is at stake, namely sexual harassment. With all respect, I believe that formulation turns the process of reviewing arbitration awards upside down. Because this undermines the entire arbitration process in sexual harassment cases, I would reverse the judgment of the district court and reinstate the arbitrator's award.

V.

Finally, the majority approves the district court's assault on the arbitrator's decision in this case by affirming the district court's remand of this case to be heard anew before a different arbitrator. It does so despite acknowledging that the district court misrepresented the arbitrator's comments and that the arbitrator did not exhibit inappropriate attitudes about sexual harassment generally. Majority

Opinion at — [Typescript at page 24]. Instead, the court bases its decision to choose a different arbitrator: 1) on our deferential scope of review of the district court's discretionary choice of a remedy; and 2) on the arbitrator's allowance of questions at the hearing and on various comments that the arbitrator made in his opinion. The majority concludes that these comments demonstrate sufficient bias against this particular sexual harassment claim to hold that it was not an abuse of discretion for the district court to remand the matter to a different arbitrator. Alternatively, the majority submits that the arbitrator's statement that if he had to make a finding on the merits he would rule in favor of Leonard, suggests a bias that merits remanding this case to a different arbitrator.

This record simply does not support the majority's contention that the arbitrator exhibited bias against this sexual harassment claim. Each reference that the majority makes to indications of bias in the record is fully explicable if the statements are put in context. The arbitrator did allow questions about whether "an average man" would sexually harass Wiegand. But the arbitrator's opinion itself suggests that such considerations were irrelevant to his decision and that he found them offensive. He commented, "[W]hether or not Wiegand is a very Christian girl, or whether Wiegand's words or acts may have invited Leonard's alleged misconduct[,] . . . . sexual misconduct of the kind charged is absolutely inappropriate and should support immediate discharge." The majority further engages in mischaracterization of the arbitrator's opinion by excerpting the phrase "unattractive and frustrated." In fact, the arbitrator suggested that to conclude that Wiegand had not been sexually harassed because she was unattractive and frustrated would be an "illogical conclusion." In sum, the arbitrator was not biased against the claim. Instead, he rejected the evidence produced by Stroehmann's shoddy investigation.

The majority also rests its decision to remand to a different arbitrator on the arbitrator's statement that if he had to decide the ultimate issue of whether sexual harassment occurred, he would rule for Leonard because there was insufficient evidence to demonstrate that sexual harassment had occurred. The majority opines that this statement indicates that the arbitrator has already prejudged the case.

To me, the arbitrator's comments only suggest that the majority's interpretation of the case is incorrect from the outset. The arbitrator found that Leonard had not been given due process, which entitled him to reinstatement, and found, in the alternative, that there was insufficient evidence of sexual harassment to terminate Leonard. Trial judges frequently "layer" their opinions in this manner.

There is no logical difference between the remedy that the majority approves in this case and remanding an Article III case with directions that it be assigned to a different district judge because that judge has provided alternate bases for his or her decision. I cannot conceive of our ordering such a reassignment merely because the judge had provided an alternate basis for his or her opinion, or on evidence of bias as flimsy as it is here. We should be even less willing to direct the remand of the present matter to a different arbitrator because of the heightened deference we owe to the arbitrator's decisions. Although I would not remand in the first instance, I believe that if we must remand, we should remand to the same arbitrator.

VI.

For the foregoing reasons, I would reverse the judgment of the district court and reinstate the arbitration award.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 1:CV-90-1359

STROEHMANN BAKERIES, INC.,
Plaintiff

vs.

LOCAL 776 INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
Defendant

MEMORANDUM

The pending action concerns this court's review of an arbitration award rendered pursuant to a collective bargaining agreement between plaintiff, Stroehmann Bakeries, Inc., and defendant, International Brotherhood of Teamsters, Local Union No. 776 (the "Union"). Each party has filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiff seeks to vacate the award, which ordered the reinstatement of one of its employees, whom plaintiff discharged for abusing a female employee of one of its customers. Plaintiff submits that the award and the arbitrator's reasoning and judgment violates the well established public policy of promoting the prevention of sexual harassment in the work place. Defendant has moved to enforce the award, contending that it was based on a fair interpretation by the arbitrator of the "just cause" provision of the collective bargaining agreement. We have examined the motions under the well settled standard. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Plaintiff employed Samuel Leonard, a member of the defendant Union, as a "store door" driver, or one who makes deliveries to plaintiff's customers. Plaintiff discharged Leonard following its investigation of a store clerk's complaints that she was sexually assaulted by Leonard as he made a delivery. A dispute arose concerning whether plaintiff had cause to terminate Leonard, and as noted the matter was referred to arbitration. On June 18, 1990, an arbitrator issued an award which concluded, (1) that plaintiff had

not adequately investigated the alleged sexual assault and, (2) that Leonard was dismissed without just cause. Leonard was ordered reinstated to his position with full back pay and benefits.

Plaintiff filed this action challenging the award on the grounds that it violates public policy in contravention of Title VII of the Civil Rights Act of 1964, which precludes sexual harassment in employment. The award is also alleged to be contrary to other well-defined precedent which reveals a strong public intolerance and repugnancy towards sexual assaults. Defendant concedes that there is in fact a well defined and dominant public policy against sexual harassment and assault. The central issue before us, therefore, is whether the arbitrator's reasoning process, language, tone, considerations, and award violate public policy.

Upon reading the arbitrator's opinion and award, the most notable omission is that he did not make a factual determination whether plaintiff, faced with the facts presented, reasonably believed that Leonard had committed an assault.[1] In other words, he "made no clear finding as to the existence or nonexistence of just cause" to discharge Leonard. *Container Products, Inc. v. United Steelworkers of America*, 873 F.2d 818 (5th Cir. 1989) (arbitrator exceeded his authority under bargaining agreement by failure to determine just cause). Rather, the arbitrator focused exclusively upon whether plaintiff's investigation of the charges against Leonard was sufficient to satisfy "industrial due process" requirements.[2] Although the extent of plaintiff's investigation is certainly relevant, we believe that the arbitrator focused too narrowly on that investigation, and failed

1. The arbitrator stated that "this action does *not* involve any fine questions of quantum proof, relative credibility of witnesses, [or] seriousness of charged misconduct." However, it is well-settled that in order for a discharge to be sustained as being for just cause it must be shown that the misconduct was sufficiently serious to warrant that penalty.

2. The phrase "industrial due process" has often been utilized in arbitration hearing. This concept generally refers to an employer's responsibility to ensure that its employees are afforded notice and some opportunity to respond to allegations of misconduct before they may be discharged for cause.

to address the merit of plaintiff's conclusion that an assault had occurred.[3] Moreover, it was not explained how or why plaintiff's investigation was deficient, or what other steps plaintiff could have pursued to improve the investigation.

The opinions and statements expressed by the arbitrator are laced with disturbing comments which indicate a clear disposition towards Leonard, and some insensitivity to claimants of sexual harassment. An arbitrator's award may be overturned if he "based his award on his own personal notions of right and wrong" *E. I. Du Pont de Nemours & Co. v. Grasselli Employees Independent Assoc.*, 790 F.2d 611, 614 (7th Cir. 1986) or "his own brand of industrial justice." *U.S. Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). Additionally the Third Circuit has long held that an arbitrator's award may be vacated where partiality and bias are shown. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 n. 27 (3d Cir. 1969).

Considerations referred to by the arbitrator in conjecturing on the matter included the following: (1) that the victim lacked a social life, had a female roommate, and did not have a boyfriend, (2) that Leonard was married and had children of certain ages, and (3) that the victim weighed 225 pounds and was, as the arbitrator termed it, "unattractive and frustrated." The arbitrator went so far as to speculate that the victim could have fabricated the incident in order to "titillate herself and attract her mother's caring attention," a suggestion that is totally unsupported and unwarranted. The arbitrator also employed such inappropriate language as, "even if [the victim] were the most celebrated slattern in seven states. . ." and that Stroehmann managers were "hobbled in their response by a puritan unwillingness to pursue a necessary inquiry into a tabu subject matter. . ."

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3. Although plaintiff has not raised the issue in its complaint, we recognize that when there is no express requirement in a collective bargaining agreement "specifying the nature or extent of an investigation" to be conducted by an employer prior to a discharge, it has been held that an arbitration decision on the issue of just cause "precluded any claim of inadequate investigation." *National Post Office v. U.S. Postal Service*, 751 F.2d 834 (6th Cir. 1985).

Further, the arbitrator expressed his personal opinion that Stroehmann managers were oversensitive in their dealings with the victim and that the victim's bashfulness and reputation as a "good Christian girl" were irrelevant. At the same time, however, he attributed much importance to the effect of the incident on Leonard's marriage. The arbitrator inexplicably disregarded Leonard's admission that he did make sexual comments to the victim concerning his wife's anatomy, which, by itself, could have been a basis for discharge. The failure to refer to Leonard's offensive remark implies that such conduct by employees is acceptable. Likewise, the arbitrator failed to consider the telling inconsistencies in Leonard's accounts of the incident.[4]

The law is well established that where an arbitrator's award violates public policy, a district court may vacate the award. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); *W. R. Grace & Co. v. Local Union 759, International Union of United Rubber, etc.*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983). As indicated, defendant agrees that public policies exist with regard to sexual harassment in the work place and against sexual assault and abuse in general. We find that the arbitrator's decision to reinstate Leonard violates such policies and sends a message to Stroehmann employees and to the public that complaints of sexual assault are not treated seriously, sensitively, or with real regard for the truth of the allegations.

The credence and weight which was attributed to irrelevant considerations, by itself, offends public policy.[5] The manner in which the award was reached could easily deter other victims, and Leonard's reinstatement could suggest to Stroehmann's work force that claims of unwitnessed sexual harassment will not be treated seriously.

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4. Leonard, when first confronted, denied all accusations. When questioned later, he accused the victim of "talking sex" to him and making sexual advances towards him.

5. Leonard's attorney was twice permitted to ask plaintiff's witness, "would you think an average man or yourself would make a pass at a woman who weighs 225 pounds?" Apparently this question was deemed relevant to the matter of just cause. We consider it irrelevant, and it implies that Leonard's version of the incident should be credited due to the victim's perceived unattractiveness.

As indicated, the arbitration was conducted without ever directly addressing the ultimate issue at hand — whether plaintiff was reasonable in its belief that Leonard had assaulted the victim. In order to fairly determine whether Leonard was discharged without cause, there must be a showing that plaintiff's determinations were incorrect, unfounded or unreasonable, which necessarily includes a consideration of whether the alleged assault occurred. The arbitrator failed to make any such determinations. To simply announce that plaintiff's investigation was insufficient, without properly considering the merits of the discharge, undermines plaintiff's ability to maintain a work force that fulfills its legal obligation to prevent incidents of the kind involved here. *See, Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA*, 915 F.2d 840 (2d Cir. 1990); 29 C.F.R. § 1604.11(d).

We wish to emphasize that the court expresses no opinion on the alleged assault or whether plaintiff reached the proper employment decision, and indeed plaintiff is not requesting that the award be overturned and that Leonard's discharge be affirmed. Rather, plaintiff asks only that the award by vacated and the matter be remanded to another arbitrator, for consideration of the matters at issue on the merits. By vacating the award and remanding for another arbitration hearing we will further another public policy that requires labor disputes to be resolved properly and impartially.

An appropriate order will issue.

ss/William W. Caldwell

William W. Caldwell
United States District Judge

Date: March 18, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-90-1359

STROEHMANN BAKERIES, INC.,
Plaintiff

vs.

LOCAL 776 INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
Defendant

ORDER AND JUDGMENT

AND NOW, this 18th day of March, 1991, upon consideration of cross-motions for summary judgment, it is ordered and declared that:

1. The arbitration award issued on June 18, 1990, in the matter of *Stroehmann Bakeries, Inc. v. International Brotherhood of Teamsters, Local 776*, AAA Case No. 14300-1939-893, JS Case No. 1523, is vacated. Said matter shall be referred to another arbitrator who shall conduct a hearing *de novo* on the issue of whether Samuel Leonard was discharged without just cause.

2. Plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied.

3. Judgment is hereby entered in favor of plaintiff and against defendant.

4. The Clerk of Court shall close this file.

ss/William W. Caldwell
William W. Caldwell
United States District Judge

Filed: March 18, 1991

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

---

In The Matter of the Arbitration
Between

STROEHMANN BAKERIES, INC.

Employer,

And

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 776,

Union,

Re: Grievance of Sam Leonard

---

Before JOHN E. SANDS, Impartial Arbitrator

OPINION

On March 29, 1990 the parties agreed to submit the following issue to arbitration by me:

> Was there just cause for the discharge of grievant Sam Leonard on November 20, 1989? If not, what shall be the remedy?

Pursuant to my authority under the parties' collective bargaining agreement I conducted a hearing in Harrisburg, Pennsylvania on March 29, 1990. Both parties appeared by counsel and had full opportunity to adduce evidence, to crossexamine each other's witnesses, and to make argument in support of their respective postitions. Each submitted a written closing statement, and neither has raised any objection to the fairness of this proceeding.

This sexual misconduct case turns less on determinations of witnesses' credibility than on the adequacy of Stroehmann's investigation prior to its discharge decision. Indeed, the *relevant* facts are undisputed. Until November 20, 1989 Sam Leonard was a transport driver who had been with Stroehmann's for seventeen years. Leonard drove a tractor-trailer, making night deliveries of large baked goods orders to supermarkets. One of his regular stops was Stauffer's Lititz

store. For ten years Leonard had been shop steward of Stroehmann's small Teamster unit. At the time of his discharge Leonard was Stroehmann's sole remaining transport driver. (On Leonard's nights off, a garage mechanic covered Leonard's routes.)

Since mid-August 1989 Kimberly Wiegand has been night custodian/receiving clerk at that facility. Leonard was a friend of Wiegand's father, having helped him get his job with Stauffer's; and Leonard was friendly with Kim Wiegand too.

Three or four times each week Leonard made deliveries to Stauffer's in Lititz while Kim Wiegand was working. They frequently exchanged banter and conversation as they did their respective jobs.

Leonard is a forty-year-old married man with two children, aged fifteen and thirteen. He stands well over six feet tall and appears to weigh more than two hundred pounds. Wiegand is five feet four and weighs 224 pounds. She does not have an active social life. Wiegand accuses Leonard of having sexually assaulted her on Sunday night, November 12, 1989.

This is how Sam Leonard's discharge came about and how the question of just cause has come to me. On Tuesday morning, November 14, 1989 Stroehmann's management received word of a serious incident that had occurred at Stauffer's Lititz supermarket on Sunday night, November 12th. Harrisport sales activator Steve Garrett and branch manager Joe Jacobs took this report from Stauffer's' store manager Ken Zimmerman:

> The night person who lets our store door driver in the store, Kimberly Wiegand, told her mother on Tuesday, 11/14/89, that when Sam Leonard was done delivering product in the store, that Sam came up behind her and grabbed her breast and pushed himself against her and that Sam also had an erection. Right after this took place, Sam told Kim "Do not tell your father because we are real good friends." Kim's father works at this store. Ken Zimmerman *does not* want Sam to serve any of the four (4) Stauffer's stores anymore. Steve and I assured Ken that corrective action would be taken immediately.

Kim's mother told Ken Zimmerman that she is considering taking legal action against Sam.
[Company Exhibit 3 B.]

At 5:20 that evening, Steve Garrett and Joe Jacobs reached Kimberly Wiegand by telephone and prepared this statement of what she had said in their twenty-minute conversation:

Steve Garret and Joe Jacobs called Kimberly Wiegand on Tuesday 11/14/89, at 5:20 P.M. Sam stopped his truck out in front of the Stauffer store and then drove out to the back dock. He rang the buzzer and Kim opened the back door and left Sam in. Sam proceeded to tell Kim that he was just talking to two girls on his CB radio and they were going to have an orgy and that he was excited about this. He started to unload the bread order and continued to talk about this orgy. Kim asked him if he was married and Sam replied that he was married, but he still had sex with other women. Sam told Kim that he would not cheat on his wife anymore, however, would still like to feel other women, but was afraid of Aids [*sic*].

When he finished unloading the bread order, Sam went to the produce cooler and took an orange. He asked Kim if her breasts were as hard as that orange. He then attempted to pull up her shirt. She resisted and pulled her shirt back down. Kim then walked to the front of the store and Sam followed her. She checked to see if the instore baker had arrived. The other employee had not arrived yet. Kim then went to the back of the store and Sam was in front of her and he asked Kim why she was following him, (sic) Sam. (sic) Then said, I know why you are following me, you want to look at my ass. They then were at the back door and Kim said she had to follow him to make sure the doors were locked. Sam then was behind Kim and reached around her and grabbed both her breasts. She again resisted and held the door open for Sam to leave. Sam said, "What is your hurry?" Are you trying to get rid of me? Sam told Kim to not say anything to her father because they were

friends and he did not want anything to change. Sam then left and Kim locked the door.

Witnesses to this conversation with Kim were; Steve Garret and Joe Jacobs, over a speaker phone with Kim's permission.

[Company Exhibits 2 and 3-A]

According to Jacobs, more than half-way through that conference call Wiegand became upset and began to sob. Garrett picked up the telephone handset and ended Jacobs' observation of Wiegand's statement. Garrett and Jacobs both confirmed that Garrett was very solicitous of Wiegand's feelings, "went easy" on her, and never questioned any of the apparent differences between her account and Zimmerman's version of her mother's report to him of what Kim had originally said to her mother.

On Wednesday, November 15th, Garrett and Jacobs had a negotiating session with the Teamsters which Leonard attended as shop steward. They mentioned nothing to Leonard or his union representative about Wiegand's accusations. Instead, Jacobs called Leonard at home after the negotiations' 2:30 or 3:00 conclusion and told him to come in to discuss a "problem" that Jacobs declined to describe on the telephone. Jacobs mentioned nothing about potential discipline, and, to Leonard's question whether he should bring a union representative, Jacobs replied, "It's up to you." Jacobs gave that answer even though he conceded that, prior to that meeting, he had already decided to suspend Leonard "pending further investigation and discharge." (Indeed, Jacobs had *already* arranged for someone else to cover Leonard's route that night!) Under these circumstances, Stroehmann's cannot seriously claim that Leonard knowing (sic) waived his right to union representation in a disciplinary meeting with management.

Leonard came right in to Jacobs' office without a union representative. There Garrett, Jacobs, and Paul Blair (Leonard's supervisor) confronted Leonard with the Zimmerman and Wiegand write-ups (Company Exhibits 3B and 3A/2). Jacobs asked Leonard for his reaction. Jacobs testified that Leonard responded that he would not so jeopardize his marriage and job and wouldn't do this, that Kim was

a "wacko," and that he denied everything she had said. Leonard specifically stated that Wiegand had to have been lying about Leonard's "orgy" statement because his CB radio was broken, and Leonard invited Jacobs and the others to come out to his tractor and see for themselves. They declined.

Jacobs wrote this summary of Leonard's response in the "Employee's Reaction or Comments" portion of the Employee Contact Report that Jacobs prepared and had Leonard sign at the interview:

> Sam claims that none of this information is not [*sic*] true and that Kimberly is a waco [*sic*]. Sams [*sic*] told myself, P. Blair Steve Garritt [*sic*] that he loved his wife and would not consider jeapordizing [*sic*] his job and marrage [*sic*].

[Company Exhibit 3.]

For "Nature of Report," Jacobs had already written, "Suspending pending dismissal" for violation of "Group III — Major Offense — Paragraph 10 — Immoral conduct or indecency on company property or while on duty." (*Id.*)

According to Stroehmann's "Disciplinary Program 'Sales Department,' " Group III infractions are subject to immediate dismissal. (Company Exhibit 4, p. 3.) Note # 1 to Company Exhibit 4 provides, however:

> *Dismissal* — when immediate action is necessary, supervisors should suspend violators with intention to dismiss. *This will allow higher management to investigate and collect the facts* before a final and official dismissal is declared.

[Company Exhibit 4, p. 4; emphasis added.]

In fact, no further investigation, fact-gathering, or confirmation efforts occurred. All that happened was a "run-by" past Stroehmann's "higher-ups" of Leonard's dismissal and a November 17th meeting at which Zimmerman advised Jacobs that he believed Wiegand's story because she was "a very Christian girl" and "bashful." So much for Note #1's admonition to investigate and collect facts!

On Monday, November 20th, Jacobs called Leonard to advise him of his dismissal. In that conversation Jacobs heard for the first time Leonard's account of what had happened on November 12th, none of which would have been culpable under or inconsistent with Stroehmann's rules, acceptable standards of social intercourse, or what Wiegand and Leonard's bantering business relationship had been. Certainly nothing Leonard admitted fulfilled Wiegand's charges of sexual assault.

By this time, however, Jacobs' discharge decision was firm. Jacobs testified that he had believed Wiegand's accusations and rejected Leonard's denials based on these three considerations:

(1) Weigand had told her mother, so her story was credible.

(2) Wiegand had told Garrett and Jacobs in their telephone conference, and her crying lent additional weight to the inherent credibility of her having told strangers such an embarrassing tale.

(3) In Leonard's shoes Jacobs would have gone down to Stauffer's to try to "work it out" with Stauffer's and Kim, but Leonard had made no such effort.

This grievance ensued, and the union has timely processed it to arbitration by me.

On these facts Stroehmann's argues (a) that Jacobs' judgment to believe Wiegand and disbelieve Leonard was reasonable; (b) that Wiegand's testimony at the hearing before me was thoroughly credible and supported Jacobs' judgment that she had no reason to lie; and (c) that the union's claim of anti-union animus is an unsupported "red herring." The union, on the other hand, contends (a) that the company's failure to make a fair and objective investigation deprived grievant of his right to industrial due process; (b) that Stroehmann's failed to establish grievant's guilt beyond a reasonable doubt; and (c) that Stroehmann's decision to discharge a seventeen-year employee based on such flimsy evidence could only have been motivated by anti-union animus.

On the entire record before me, including my assessments of witnesses' credibility and the probative value of evidence, I must

sustain Leonard's grievance as meritorious and grant the remedy the union seeks for him. I reach that conclusion for the following reasons.

First, it is essential at the outset to eliminate what this decision does *not* involve. It does *not* involve any fine questions of quantum of proof, relative credibility of witnesses, seriousness of charged misconduct, or presence of anti-union animus. If Stroehmann's investigation had been at all consistent with the severity of Wiegand's accusations and of their consequences for Leonard's life and if that investigation had provided an adequate basis to believe Leonard had behaved as charged, Stroehmann's discharge decision would have been unassailable. And it would not have mattered whether Stroehmann harbored anti-union animus, whether Rule III.10 applies by its terms to transport as well as sales department personnel, whether or not Wiegand is a "very Christian girl," or whether Wiegand's words or acts may have invited Leonard's alleged misconduct. The simple truth is that, even if Wiegand had been the most celebrated slattern in seven states, sexual misconduct of the kind charged is absolutely inappropriate and should support immediate discharge.

Second, what *is* involved in this case is the absolute insufficiency of Stroehmann's response to the information its management received on November 14th from Zimmerman and Wiegand. Although both Jacobs and Garrett testified to the necessity for establishing facts before making any decision, their professed concern was mere lip service.

Neither Jacobs nor Garrett did anything more to determine what in fact had happened on November 12th than to accept uncritically Wiegand's telephone account of bizarre behavior on Leonard's part. No one probed the apparent inconsistencies between Wiegand's statement and Zimmerman's double hearsay account to them (and triple hearsay in Company Exhibit 3-B) of what Wiegand's mother had told him Weigand had told her. No one met Wiegand in person to evaluate her appearance and demeanor. (For example, at the hearing before me Wiegand stopped cold and then blushed furiously when a simple question about the location of an orange pointed out a hole

in her story. It really does not matter where the orange in fact had been. What did matter was Wiegand's embarrassment that everyone saw at the hearing but no one in Stroehmann's management had an opportunity to see in their limited investigation.) No one even required Wiegand's timely signature on Jacobs' account of her telephone statement. (In fact, Jacobs sent that statement to Stauffer's for Wiegand's execution, a process that required more than two months and three or four telephone reminders.)

More important, Jacobs and Garrett never once asked Leonard himself what had happened at Stauffer's Lititz store on November 12th. Instead, withholding warning and opportunity to prepare, they cornered Leonard alone and confronted him with scurrilous accusations and scurrilous behavior that Jacobs and Garrett had already accepted as Gospel. (Indeed, before having sought the facts according to Leonard, Jacobs had already arranged for Leonard's suspension and replacement on November 15th.) And between that time and the November 20th discharge decision, Stroehmann's management did nothing more to investigate the facts than to confirm Zimmerman's impressions of Wiegand's bashfulness and of her status as a "very Christian girl." Not only am I mystified by the relevance of those issues to the charges against Leonard, but I am equally stumped, assuming their relevance, by Stroehmann's failure to consider with equal weight Leonard's Christianity or his status as a married father of two.

Third, as a result of the absolute insufficiency of Stroehmann's investigation, it could not possibly have made a supportable judgment concerning the charges against Leonard. This is not to say that I believe Wiegand was lying and Leonard was truthful. The point is that, even on the complete record before me, I have insufficient evidence to resolve the credibility conflict between Wiegand and Leonard. And if that were the determinative question before me, Stroehmann would have had to lose for having failed to bear its burden of proof.

Finally, Jacobs' stated reasons for having believed Wiegand's story defy logic. He believed Wiegand because she had told her mother, because she had told two strangers, and because Leonard had made

no effort to make peace with Stauffer's and Wiegand between November 15th and 20th.

Yet the unchallenged "facts" Jacobs accepted as true can also support the equally illogical conclusion that Wiegand, unattractive and frustrated, could have fabricated a disturbing incident to titillate herself and attract her mother's caring attention. And, her story having gained sufficient momentum, Wiegand was unable to disengage from it. Whether one casts either Wiegand or Leonard as the victim, neither scenario can stand scrutiny based on Stroehmann's burlesque of an investigation.

Nor can I, on this record, find evidence that anti-union animus motivated Jacobs and Garrett. In truth, I believe that they were both shocked and embarrassed by Wiegand's story and, as well, hobbled in their response by puritan unwillingness to pursue a necessary inquiry into the tabu subject matter she raised. The result — an uncritical acceptance of Wiegand's charges — is as reprehensible as would have been a sexist assumption that Wiegand had been "asking for" whatever she got. In this scenario it was only coincidental that Leonard's discharge also satisfied a large customer's demand that Leonard stop servicing their stores.

The bottom line is that Stroehmann's discharge decision lacked just cause, and it must accordingly reinstate Leonard to employment with full back pay and benefits less interim earnings.

By reason of the foregoing, I issue the following

## AWARD

1. Stroehmann's Bakeries, Inc. lacked just cause to discharge grievant Sam Leonard from employment on November 20, 1989.

2. The company shall reinstate grievant to employment effective November 20, 1989 with full back pay and benefits less interim earnings.

Dated: June 18, 1990
South Orange, NJ

ss/John E. Sands
JOHN E. SANDS

ACKNOWLEDGEMENT

State of New Jersey )

s.s.:

County of Essex )

On June 18, 1990, JOHN E. SANDS, whom I know, came before me and executed the foregoing as his Opinion and Award in the above-captioned matter.

ss/Kathleen C. Miller

Kathleen C. Miller, Notary Public
State of New Jersey, My Commission
Expires May 10, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 91-5261

---

STROEHMANN BAKERIES, INC.,
Appellee

v.

LOCAL 776, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,
Appellant

---

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 90-01359)

---

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN,
NYGAARD, ALITO and ROTH, *Circuit Judges*

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
ss/William D. Hutchinson

Circuit Judge

DATED: JUL 24 1992

STROEHMANN BAKERIES, INC.

- and -

CHAUFFEURS, TEAMSTERS & HELPERS —
LOCAL UNION No. 776

# HARRISBURG SALES AGREEMENT

November 13, 1986 to November 12, 1989

THIS AGREEMENT made this 13th day of November, 1986, by and between CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION No. 776, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS of Harrisburg, Dauphin County, Pennsylvania (hereinafter called the "Union"), party of the first part, and STROEHMANN BAKERIES, INC., a Pennsylvania corporation, with its principal place of business in the City of Williamsport, Lycoming County, Pennsylvania, and with one of its bakeries at Harrisburg, Pennsylvania, (hereinafter called the "Company" or the "Employer"), party of the second part.

* * *

## SECTION A

Applicable to all Employees in the Bargaining Unit

### ARTICLE A-I — PURPOSE

The purpose of this Agreement is to insure industrial peace at the Company's sales agency located in the Harrisburg, Pennsylvania vicinity. The parties hereto recognize that without mutual understanding, harmony and cooperation among employees and between employees and employer, it is impossible to operate a bakery business with the economy and efficiency indispensable to its existence and to the best interests of its employees.

ARTICLE A-II — UNION RECOGNITION, MEMBERSHIP & CHECK-OFF

The Company recognizes the Union as the sole collective bargaining agency for the employees in the job classification referred to in Article B-I and Article C-I below employed by the Company at its Harrisburg Plant.

For all such classifications of employees the company agrees not to retain in its employ any but members of the Union in good standing, subject to the applicable provisions of the law. Any employees not presently members must become members in good standing on the thirtieth day following the effective date of this Agreement. New employees shall apply immediately for membership in the Union and shall become members of the Union at the end of thirty days after date of employment, subject to the applicable provisions of the law. The Union agrees to admit such new members into the Union and further agrees that the discharge of any employee who has worked for the Employer for sixty (60) days or less shall be final and that no action whatsoever shall be taken by the Union in respect to such discharge.

The Company will notify the Union of the hiring of new employees.

In the case of each employee who voluntarily executes an authorization meeting the requirement of the law, the Company will check off the monthly dues of such employee and remit the same to the Local Union.

The parties hereto do hereby acknowledge that the job classifications set forth in Article B-I and Article C-I represent all of the job classifications which are presently filled and covered by the classification of the National Labor Relations Board in Case No. 4-RC-4960; and, further, they agree that should any additional, new of (sic) different job classifications within the comtemplation of the certification be added during the life of this contract, the rates of pay and conditions of employment which shall be applicable thereto shall be established by negotiation and agreement of the parties.

* * *

ARTICLE A-IV — DISCIPLINE

The Company agrees to exercise the power of discipline and discharge fairly and with regard for the reasonable rights of the employees. Any employee who has been disciplined or discharged for any reason shall have the right to a hearing under the grievance and arbitration provisions of Article A-VIII (sic) hereof, provided such employee requests a hearing through the Union Steward, who shall deliver such request in writing to the Plant Manager in Harrisburg, Pennsylvania, within a period of three (3) working days. At the hearing he may be represented by the Business Agent of the Union. In the event of disagreement, the case may be taken by the Union to the Board of Arbitration provided for in Article A-VIII (sic) hereof. Arbitration arrangements are to be completed in two (2) weeks. The Union agrees not to press any case involving theft, dishonesty, falsifying of accounts, records, reports, etc., failure to account for monies collected for the account of the company, drunkenness or drinking while on duty, continued absence without leave, repeated lateness after warning, permitting unauthorized persons to ride on the Company's vehicles, employing unauthorized helpers in any manner whatsoever, or continued failure to meet a reasonable measure of efficiency, if it is established that the employee has committed the act or acts charged. The Company shall have the absolute right to dismiss any employee within sixty (60) days from the date of hiring from which there shall be no appeal.

The findings of any panel which may be established to fix blame for accidents shall not be offered in evidence by either party in any arbitration proceeding under Article A-VIII (sic). The Union will be given the opportunity to have an observer present when any such panel is convened.

* * *

ARTICLE A-VIII — NO STRIKE CLAUSE

Under no circumstances shall there be any strike, lockout, cessation of work, sit-down, picketing, boycott, refusal to perform any part of duty, or other interference with or interruption of the normal conduct of the Company's business during the term of this Agreement, or during the negotiation of any renewal of this Agreement.

## ARTICLE A-IX — GRIEVANCE AND ARBITRATION

Every effort shall be made to adjust amicably between the Company and the Union all grievances, complaints, differences and disputes. In the event that any difference cannot be settled between the parties themselves, the question may be submitted to one of two permanent arbitrators to be selected by the parties. If neither arbitrator is able to serve in a particular case the matter may be submitted to arbitration by either the Union or the Company in accordance with the rules and procedures of the American Arbitration Association. The parties agree to expedite arbitration.

The Arbitrator's award shall be based upon the provisions of this Agreement. The Arbitrator shall have no power to alter, modify, or amend any of the provisions of this Agreement or to impose any obligation or duty upon either party which is not imposed under the express provisions of this Agreement.

If a dispute is not settled between the parties in accordance with the foregoing provisions, arbitration must be requested within thirty (30) days from the time that the matter was first discussed unless this time limit is extended by written agreement between the parties.

* * *

## DISCIPLINARY PROGRAM "SALES DEPARTMENT"

| RULES<br>GROUP I - MINOR OFFENSE | PENALTIES<br>1ST | 2ND | 3RD | 4TH | 5TH |
|---|---|---|---|---|---|
| 1. Absenteeism | Verbal | Written | 2 Days Off | 5 Days Off | Dismissal |
| 2. Tardiness: Failure to pick-up and check load sheets by assigned time | Verbal | Written | 2 Days Off | 5 Days Off | Dismissal |
| 3. Failure to report off to *Sales* Management or Sales Supervision | Verbal | Written | 2 Days Off | 5 Days Off | Dismissal |
| 4. Unsatisfactory Work Performance | Verbal | Written | 2 Days Off | 5 Days Off | Dismissal |
| 5. Defacing of company property | Verbal | Written | 2 Days Off | 5 Days Off | Dismissal |
| 6. Failure to wear proper uniform and maintain personal neatness | Verbal | Written | 2 Days Off | 5 Days Off | Dismissal |
| 7. Failure to keep inside of vehicle clean | Verbal | Written | 2 Days Off | 5 Days Off | Dismissal |
| 8. Multiple mistakes on Sales Slips and Settlement Sheets | Verbal | Written | 2 Days Off | 5 Days Off | Dismissal |
| 9. Failure to cooperate in keeping platform area clean and orderly | Verbal | Written | 2 Days Off | 5 Days Off | Dismissal |

| GROUP II - MAJOR OFFENSE | PENALTIES | | |
|---|---|---|---|
| 1. (a) Failure to report off work<br>(b) Unable to contact | Written | 5 Days Off | Dismissal |
| 2. Threatening other employees | Written | 5 Days Off | Dismissal |
| 3. Reporting for work in a condition unable to perform duties | Written and sent home | 5 Days Off | Dismissal |
| 4. Horseplay or other disorderly conduct | Written | 5 Days Off | Dismissal |
| 5. Gambling on company premises | Written | 5 Days Off | Dismissal |
| 6. Violation of a Safety Rule, including failure to report an accident | Written | 5 Days Off | Dismissal |
| 7. Leaving plant before being contacted by supervision (P.M.) | Written | 5 Days Off | Dismissal |
| 8. Smoking, eating or drinking except in designated areas | Written | 5 Days Off | Dismissal |
| 9. Failure to pick-up products on code | Written | 5 Days Off | Dismissal |
| 10. Failure to serve a customer or maintain a reasonable service schedule | Written | 5 Days Off | Dismissal |
| 11. Failure to return tubes, sleeves, baskets, and boxes to bakery | Written | 5 Days Off | Dismissal |
| 12. Failure to attend Sales Meetings | Written | 5 Days Off | Dismissal |

THE FOLLOWING INFRACTIONS ARE SUBJECT TO IMMEDIATE DISMISSAL

GROUP III - MAJOR OFFENSE

1. Insubordination: Refusal to perform work properly assigned by a supervisor; or, attacking a supervisor with obscene or other abusive language.
2. Falsifying any company records
3. Theft of company property, products, funds, or possession of other employees or customers
4. Deliberately delaying or restricting work output or inciting others to do so
5. Possession, or use of alcoholic beverages, drugs, or marijuana on company property or while on duty
6. Reporting for work under influence of alcoholic beverages, drugs, or marijuana
7. Physically assaulting another employee, or customer on company premises or while on duty
8. Deliberate destruction of company property, equipment, trucks, products: or, destruction of or damage to the property of other employees or Stroehmann customers
9. Possession of firearms or other dangerous weapons on company property or while on duty
10. Immoral conduct or indecency on company property or while on duty
11. Disclosure of confidential company information to unauthorized persons
12. Negligent or willful introduction of foreign objects or foreign substances into company products

CONTINUED

Note # 1: Dismissal - When immediate action is necessary, supervisors should suspend violators with intent to dismiss. This will allow higher management to investigate and collect the facts before a final and official dismissal is declared.

Note # 2: Disciplinary action for a Group I or Group II rule will be based on an employee's record over the previous twelve (12) month's period. No instance of more than twelve month's old shall be used in determining this penalty to be applied for a current infraction of a rule.

Note # 3: Penalties shall apply to groups and not to individual rules. Thus violation of different rules within a group shall warrant the application of successive penalties. Accordingly, for example, violations of Rules 1, 7 and 8 within Group I shall require the application of the third step penalty and not the first step penalty for each offense.

Supreme Court, U.S.
FILED
NOV 16 1992
OFFICE OF THE CLERK

No. 92-688

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

LOCAL 776, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
*Petitioner*,

*v.*

STROEHMANN BAKERIES, INC.,
*Respondent*.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:

Morgan, Lewis & Bockius

Dated: November 16, 1992

Steven R. Wall, Esquire
(Counsel of Record)
Catherine Reid, Esquire

2000 One Logan Square
Philadelphia, PA 19103
(215) 963-4928

## QUESTION PRESENTED

May a reviewing court refuse to enforce an arbitration award on the grounds that it violates the well-defined and dominant public policy obligating an employer to eradicate workplace sexual harassment, where the arbitrator's interpretation of the collective bargaining agreement reinstates an employee accused of sexual harassment without a determination as to whether the alleged harassment occurred?

## RULE 29.1 DISCLOSURE

The parent companies of Stroehmann Bakeries, Inc. are George Westin, Ltd., a publicly traded Canadian corporation, Westin Foods Inc., GWIBV Holdings B.V., and George Westin Inc. The affiliates of Stroehmann Bakeries, Inc. are Interbake Foods, Certi-Fresh Foods Inc., William Nielson Inc., and Instant Products of America, Inc.

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No. 92-688

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

October Term, 1992

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LOCAL 776, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
*Petitioner,*

*v.*

STROEHMANN BAKERIES, INC.,
*Respondent.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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# RESPONDENT'S BRIEF IN OPPOSITION

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Respondent Stroehmann Bakeries, Inc. ("Stroehmann") respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Court of Appeals for the Third Circuit.

## STATEMENT OF THE CASE

This case arises from a discharge grievance submitted to arbitration pursuant to the terms of a collective bargaining agreement. The grievance arose

when Stroehmann terminated the employment of Samuel Leonard, a truck driver who had been accused of sexually assaulting a customer in the course of his job duties delivering Stroehmann products. After investigation, Stroehmann determined that Leonard had committed the assault and discharged him. A-4-6. Mr. Leonard's Union filed a grievance over the termination and the matter was eventually submitted to arbitration. A-6. The arbitrator, John L. Sands, expressly refused to determine whether the alleged assault occurred, despite the testimony at the hearing of both the grievant and the victim. Instead, he found that Stroehmann had insufficiently investigated the alleged incident before discharging Leonard. Based solely on this finding, he ordered Leonard's reinstatement with full back pay, less interim earnings. A-6.

Stroehmann sought to vacate the arbitrator's decision in the United States District Court for the Middle District of Pennsylvania. The District Court vacated the award after concluding that there exists a well-defined and dominant public policy obligating employers to eliminate sexual harassment in the workplace, and that the arbitrator's award violated that public policy. A-7. Specifically, the District Court found that the arbitrator undermined Stroehmann's attempt to eliminate sexual harassment by its employees when he ordered the reinstatement of the grievant without an actual determination as to whether the grievant did or did not commit the assault. The District Court remanded the

matter for a determination on the merits. In its discretion to formulate an appropriate remedial order, however, it remanded the grievance to a different arbitrator because the court concluded that Arbitrator Sands had demonstrated a clear predisposition in Leonard's favor and an insensitivity to sexual harassment claims. A-18.

The Court of Appeals for the Third Circuit affirmed the District Court, expressly finding that "[u]nder the circumstances present here, an arbitrator's award reinstating an employee accused of sexual harassment without a determination regarding the merits of the allegation violates well-established and dominant public policies concerning sexual harassment in the workplace." A-3. Because the award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether harassment occurred, the court found that the award did not discourage sexual harassment, but instead undermined the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace. A-11. The court further held that the District Court did not abuse its discretion in remanding to a new arbitrator because the record sufficiently demonstrated Arbitrator Sands' partiality toward Leonard. A-18.

## REASONS FOR DENYING THE WRIT

The petition filed by the Union represents a disingenuous attempt to disguise a case as worthy of Supreme Court review simply because the Union does not accept the holdings of the two courts below. In attempting to describe non-existent conflicts with the holdings of this Court and other courts of appeals, the Union misstates the holdings of the Court of Appeals for the Third Circuit and the District Court for the Middle District of Pennsylvania, as well as those of this Court and other circuits.

Even a brief reading of the opinions of the two courts below renders two points clear. First, both lower courts acknowledged their limited authority in reviewing arbitration awards and carefully followed this Court's holding in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). Both courts identified a well-defined and dominant public policy by referring to positive law and then found that the arbitrator's interpretation of the parties' collective bargaining agreement violated that public policy. A-8-11; A-34; A-37. In doing so, the two courts below acted consistently with the other circuits that have addressed the validity of arbitration awards implicating the public policy demanding eradication of sexual harassment in the workplace. Second, the Court of Appeals twice expressly noted that it was applying the

clearly established rule of law to the narrow circumstances presented by the case, making it of limited importance, perhaps of importance only to the litigants themselves. A-3; A-11.

Thus, the Petition for Writ of Certiorari should be denied because the legal standard for judicial review of arbitration awards, which is well-established by the decisions of this Court, was correctly applied by the District Court and the Court of Appeals, with identical results. The case presents no conflict with the decisions of this Court and no conflict with the decisions of the other circuits. Moreover, the case raises no important question of federal law as the courts below did not establish any new rule of law, but rather expressly applied established law to a narrow set of facts.

### A. The Courts Below Correctly Applied The Legal Standards Established By The Court Regarding The Review of Arbitration Awards.

Stroehmann and the two courts below agree with the Union that courts play only a limited role in reviewing arbitration awards. A-8-9; A-35. However, in *Misco*, this Court outlined an exception to the deference usually owed to an arbitrator's award, holding that courts may not enforce arbitration awards where the arbitrator's interpretation of the parties' collective bargaining agreement violates a well-defined and dominant public policy. It was on this narrow exception that the two

courts below relied, carefully applying the holding of *Misco* in reviewing Arbitrator Sands' award. A-9; A-36. Therefore, the Union's lengthy discussion concerning a reviewing court's generally narrow role, occupying pages 5 through 9 of its Petition, is misleading and irrelevant. The courts below acted within an exception to the general rule, correctly applying precedent established by the Court in *Misco*.

Contrary to the impression the Union seeks to convey, the Court of Appeals for the Third Circuit and the District Court for the Middle District of Pennsylvania did not usurp the authority of the arbitrator or substitute their judgments for that of the arbitrator. The courts did not rule on the merits; neither court determined whether Samuel Leonard committed the alleged harassment or assault.[1/] A-14; A-37. Nor did either court impose a

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1/ The Union raises a red herring in arguing that the appellate court acted impermissibly in reviewing the evidence that the arbitrator relied on in determining that Leonard had not received adequate industrial due process. Quite obviously, if a court is to fulfill the role contemplated by *Misco*, it *must* look at the evidence presented to the arbitrator. Otherwise, it would be unable to determine whether the award crafted by the arbitrator in the factual setting presented to him was consistent with the public policy concerns raised by the case. *Misco* itself contemplated that reviewing courts would be required to examine evidence presented at the arbitration. In fact, the court stated that "[i]n pursuing its public policy inquiry, the Court of Appeals *quite*

remedy that it thought more appropriate than that imposed by the arbitrator. To the contrary, the District Court remanded the arbitration to a new arbitrator, *expressly supporting the policies underlying labor arbitrations*. A-14; A-37. The appellate court affirmed this course of action. A-18-19.[2/] Therefore, both courts acted

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*properly* considered the established fact that traces of marijuana had been found in Cooper's car." 484 U.S. at 44 (emphasis added). In the instant case it would be impossible to determine if the arbitrator's award, which was founded on his evaluation of the industrial due process afforded to Leonard, violated public policy without examining the evidence on which the arbitrator relied.

Moreover, even assuming *arguendo* that the appellate court exceeded its authority slightly in this area, it is irrelevant in determining whether to grant or deny the Writ. The court did not base its finding that the award violated public policy on its disagreement with the arbitrator regarding industrial due process. It only addressed the due process issue in order to dispose of the Union's argument that the District Court did not give proper weight to industrial due process concerns. It is abundantly clear from the opinions that both lower courts vacated the arbitration award because it violated public policy, not because in their opinion Leonard had received sufficient due process. A-14.

[2/] The Union's argument that the Court of Appeals usurped the role of the arbitrator by determining procedural questions is puzzling. The Union provides no explanation as to how the appellate court's holding places the burden of proof on an employee to disprove allegations of harassment. To the contrary, the Court of Appeals' opinion expressly makes no changes in the allocation of the burden of proof between employee and employer. A-19, n.8. The only burden affected by the court's holding is the burden *on the arbitrator*.

consistently with the law long since established by this Court in the cases known as the *Steelworkers' Trilogy*.[3/]

The reason both courts below refused to enforce the arbitration award is clear from the opinions. Relying on *Misco*, both courts identified a well-defined and dominant public policy demanding the elimination of sexual harassment in the workplace by referring to existing laws and legal precedents. A-10-11; A-34.[4/] The

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3/ *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

4/ The Union criticizes the lower courts' reliance on Title VII, misinterpreting Title VII as having no effect where an employee of one company harasses the employee of another. Clearly, Stauffers had an obligation to make Ms. Weigand's workplace free of harassment -- a goal which could only be accomplished through Stroehmann's investigation of the allegations against its employee. And although an employee of Stauffers *may* not have had a cause of action under Title VII against Stroehmann, it does not follow that the concerns raised by Title VII are not presented in this case. They are clearly present since the arbitration award allows an individual to return to the workplace, in fact to the many workplaces he visits in the course of his job duties, without determining if he engaged in sexual harassment or is likely to do so again.

Moreover, the Union is not in a position to criticize the lower courts' reliance on Title VII. It *conceded* at the district court level that well-defined and dominant public policies against sexual harassment and assault existed. A-34. At the appellate level, the Union never

courts then found that Arbitrator Sands, although confronted with an employee discharged for allegedly sexually assaulting an individual in the course of his job duties, interpreted the parties' contract in such a way that he avoided determining whether the employee committed the acts of which he was accused. A-7; A-34. The arbitrator's interpretation, therefore, violated explicit public policy. A-3; A-37.

The Union's argument that the Court of Appeals exceeded its authority under *Misco* relies upon a mischaracterization of the court's holding. The Union acknowledges that *Misco* allows a court to refuse to enforce an award where the arbitrator's interpretation of the contract violates public policy. Petition at 9. The Union then argues that the two courts below focused on the arbitrator's "reasoning," instead of his "award," thus exceeding their authority under *Misco*. As the appellate opinion makes clear, the Union's argument lacks merit:

> The Union misunderstands the rationale for the district court's holding when it argues that the court improperly found the means used to reach the award, and not the award itself violated public policy. The

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criticized the District Court's reliance on Title VII as the source of the public policy in support of the prevention of harassment in the workplace; nor did it argue that the public policy at issue in the case was not well-defined and dominant, or that it could not be ascertained by reference to law and legal precedent.

> district court held that the award itself violated public policy because the award would have reinstated Leonard without determining the merits of the allegations against him. That holding is proper because an award of full reinstatement without findings on what Leonard did violates the strong public policy against prevention of sexual harassment in the workplace. The Union's first argument lacks merit. A-14.

Contrary to the Union's argument, both courts below acted within the authority granted by *Misco* when they found that, as the appellate court stated, "Arbitrator Sands' interpretation of the Agreement's clause relating to industrial due process neither considered nor respected public policy. Instead, his interpretation violated it." A-14.

### B. There Is No Split Among The Courts Of Appeals That Must Be Resolved By The Court.

This case does not present the Court with any split among the courts of appeals. To date, four circuit courts, including the appellate court below, have addressed the appropriateness of an arbitration award involving the discipline of an employee accused of sexual harassment. All four appellate courts have held that *Misco* provides the framework for their analyses. All four appellate courts have held that the public policy in support of

eliminating sexual harassment in the workplace is well-defined and dominant within the meaning of *Misco*. The courts have then simply applied *Misco* to the specific arbitration award at issue. It is only because the *facts* before each court differed, that the results have differed.[5/] The reasoning applied by all courts has been identical. In fact, the Court of Appeals for the Third Circuit expressly noted that the opinions of the Courts of Appeals for the Second and Tenth Circuits *supported* its decision. A-12.

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[5/] In *Communication Workers of Am. v. Southeastern Elec. Cooperative*, 882 F.2d 467 (10th Cir. 1989) and *Chrysler Corp. v. International Union, Allied Indus. Workers of Am.*, 959 F.2d 685 (7th Cir.), *cert. denied*, No. 92-38, 1992 WL 171385 (Oct. 5, 1992), the appellate courts affirmed enforcements of arbitration awards which reinstated employees discharged for sexual harassment. The courts found that the arbitration awards fully considered the public policy concern involved. Reinstatement did not violate that concern because, under the circumstances presented, the employees involved had been sufficiently disciplined, and were unlikely to engage in harassment again. In *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991), the court refused to enforce an arbitration award involving sexual harassment because, on the facts presented by that case, reinstatement of an unrepentant repeat offender violated public policy.

Thus, there is no split in the circuits that would justify review by this Court.[6/] Review would simply embroil the Court in a routine application of *Misco* to an unremarkable fact pattern -- a task that both courts below have already undertaken with identical results.

### C. There Is No Important Federal Question That Must Be Resolved By The Court.

Finally, this case presents no important federal question for the Court's review. In an attempt to fabricate one, the Union alleges that the court below somehow established a general rule requiring arbitrators to make a determination on the merits in every case involving allegations of sexual harassment. The Union further argues that this somehow elevates the public policy against sexual harassment in the workplace above the public policy at issue in *Misco*. The Union contends

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6/ The Union's argument that there is a split in the circuits because the Court of Appeals for the Third Circuit looked to whether Leonard's *conduct*, as opposed to the arbitrator's award, violated public policy is almost unworthy of comment. A brief reading of the lower courts' opinions disposes of the Union's argument. No less than nine times did the appellate court state that it was the arbitrator's interpretation of the collective bargaining agreement, *the award itself*, which it found violative of the public policy. A-3; A-11; A-13; A-14; A-19. Similarly, the District Court twice stated that the arbitrator's *decision* violated public policy. A-36; A-37. Neither court gives any indication whatsoever that it considered Leonard's conduct; rather they considered the conduct of the arbitrator.

that this would open the floodgates to litigation attempting to establish a hierarchy among public policies. However, no such danger threatens the Court. The Court of Appeals clearly did *not* establish a general rule requiring a determination on the merits in all cases involving sexual harassment. To the contrary, the Court of Appeals twice expressly limited its holding to the circumstances presented by the case. A-3; A-11.

Nor is the holding of the court below, requiring a determination of the merits, inconsistent with *Misco* or the holdings of the two courts cited by the Union. It was not a competition among different public policies that led to the differing results in *Misco*, *Perma-Line*, *Pan American* and *Stroehmann*. Instead, it was the different facts with which the courts were presented.[7/] To grant *certiorari* on

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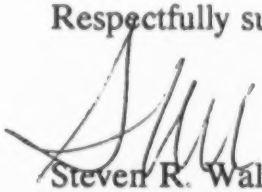
7/ In *Misco*, no determination as to whether the employee actually smoked marijuana in his car was necessary because, even if the employee had done so, an award of reinstatement would not clearly violate public policy, because the connection between using drugs in one's car and using them in the workplace was tenuous. At issue in *Perma-Line Corp. v. Sign Pictorial and Display Union*, 639 F.2d 890 (2d Cir. 1981) was a presumptively illegal contract provision. Thus, further analysis of the contract provision, and not a determination as to whether the employee engaged in the alleged conduct, which apparently was undisputed, was necessary to ensure the award's compliance with public policy. In *Pan American World Airways v. Air Line Pilots Ass'n (In re Pan American Corp.)*, 140 B.R. 336 (S.D.N.Y. 1992), a determination on the merits was unnecessary largely because one had already been performed by the National Transportation Safety Board.

this basis would simply involve the Court in applying the analysis which it has already applied in *Misco* to a different fact pattern.

## CONCLUSION

Because both courts below acted within the authority to review arbitration awards established by this Court, and because their holdings are consistent with the holdings of the other courts of appeals that have addressed similar issues and raise no important federal questions, the Union's Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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Dated: November 16, 1992

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*Id.* at 341-42. In the instant case, the two courts below found that the facts presented by the case *did* require a determination on the merits, because the individual was alleged to have engaged in serious sexual misconduct while in the course of his job duties, job duties to which the arbitrator's award would have returned him.